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In The
Supreme Court of the United States

H.C. BAILEY, JR., W.C. BAILEY, JOAN B. BAILEY, HARPERVILLE IRREVOCABLE TRUST, JOHN T. COSSAR, GLYNN HUGHES, LEWIS S. TILGHMAN, KENNETH W. WARREN and MADISON HILLS FARMS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA and the FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Government breached a contract, indistinguishable from those at issue in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), providing Petitioners' savings and loan institution with regulatory capital. As a direct result of that breach, the thrift failed to satisfy its regulatory capital requirements, was seized by the Government, and placed in the hands of the Federal Deposit Insurance Corporation as receiver. The court of appeals accepted as true that but for the breach the thrift would have remained in business and would have been worth at least $44 million. Nevertheless, the court held that Petitioners could not recover the value of their thrift because the Government's breach also caused losses to the Government itself, as receiver and deposit insurer, in an amount greater than $44 million.

The Questions Presented are:

1. Did the Federal Circuit err in holding that the Case or Controversy requirement of Article III required dismissal of the contract claim against the Government because the damages suffered by the Government as a result of its own breach were greater than the damages suffered by Petitioners as a result of the Government's breach?

2. Did the Federal Circuit err in rejecting as a matter of law Petitioners' claim that their property had been taken without payment of Just Compensation?

PARTIES TO THE PROCEEDING

Petitioners are H.C. Bailey, Jr., W.C. Bailey, Joan B. Bailey, Harperville Irrevocable Trust, Carol A. Bailey, Malco Irrevocable Trust, John T. Cossar, Glynn Hughes, Lewis S. Tilghman, Kenneth W. Warren, and Madison Hills Farms, Inc.

Respondents are the United States of America, the defendant-appellee in the court below, and the Federal Deposit Insurance Corporation, as Successor to Security Savings and Loan Association, a plaintiff-appellant in the court below.

CORPORATE DISCLOSURE STATEMENT

Madison Hills Farms, Inc. is a corporation organized under the laws of the State of Mississippi. It does not have a parent corporation, and no publicly-held company owns 10 percent or more of the stock of the corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners H.C. Bailey, Jr., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 341 F.3d 1342 (Fed. Cir. 2003), and is reprinted in the appendix hereto ("App.") at App. 1a-10a. The order of the court of appeals denying rehearing and rehearing *en banc* is reprinted at App. 77a. The opinions of the Court of Federal Claims are reported at 53 Fed. Cl. 251 (2002), 53 Fed. Cl. 31 (2002), 51 Fed. Cl. 265 (2001), and 47 Fed. Cl. 2 (2000), and are reprinted at App. 11a-24a, 25a-28a, 29a-58a, and 59a-76a, respectively.

JURISDICTION

The court of appeals entered judgment on August 27, 2003, and entered an order denying rehearing and rehearing *en banc* on October 28, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of Article III, Section 2 of the United States Constitution, the Fifth Amendment, and the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. 101-73, 103 Stat. 183, 12 U.S.C. §§ 1821(d)(11)(A) and (g)(1), are reprinted at 80a-81a.

STATEMENT

This case arises from the Government's breach of two regulatory capital contracts with Security Savings and Loan Association ("Security") of Jackson, Mississippi,

similar to those before the Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Under these contracts, the Government promised to permit Security to count over $30 million in supervisory goodwill, capital credits, and Income Capital Certificates as regulatory capital. As in *Winstar*, the Government breached the contracts by enacting and enforcing the Financial Institutions Reform, Recovery and Enforcement Act, Pub. L. 101-73, 103 Stat. 183 ("FIRREA"), in 1989. As a direct result of this breach, Security failed to satisfy its minimum regulatory capital requirements, and the Government seized it, placing it in the hands of the Federal Deposit Insurance Corporation ("FDIC") as receiver. The FDIC, in turn, liquidated the thrift, which resulted in a receivership deficit of $71 million, the vast bulk of which ($66 million) represented the Government's own costs as insurer of Security's deposits.

In the proceedings below, Petitioners (the former shareholders of Security) asserted that but for the Government's breach, Security would not have been seized and would have been worth no less than $44 million. And had Security not been seized, there would have been no receivership, and the FDIC would not have incurred any liquidation or other costs, which it estimates at approximately $71 million as of December 2000. App. 3a. In light of these facts, which were taken as true for purposes of the Government's summary judgment motions, Petitioners maintained that the proper measure of expectation damages flowing to Security's receivership estate should be at least $115 million – the difference between Security's actual position (negative $71 million) and the position it would have occupied but for the breach (positive $44 million). Following application of the statutory priority scheme (under which the FDIC's subrogated claim for receivership costs is senior to Petitioners' claims on the receivership estate), *see* App. 34a-35a, Petitioners argued, the $44 million surplus remaining after satisfaction of the $71 million receivership deficit should flow to them.

The Federal Circuit rejected Petitioners' claim as a matter of law, holding that Article III of the Constitution barred any recovery of contractual damages. First, the court of appeals held that the receivership deficit could not be included as a component of contract damages even if the Government's loss was a direct and foreseeable result of the Government's breach of its contract with Security. The court explained that the receivership deficit consists largely of the FDIC's own subrogated claim against Security's receivership estate for funds (with interest) advanced by FDIC, from the FSLIC Resolution Fund ("FRF"), to cover the Government's losses as deposit insurer and other liquidation costs. FDIC valued its subrogated claim at $66.4 million as of October 2001. App. 3a. The FDIC, however, is also the real party in interest on the other side of the "v.," for it would be obliged to pay, with funds from the FRF, any judgment against the United States for breach of contract. App. 40a. As a result, if the court awarded the $71 million receivership deficit as a component of consequential contract damages to Security's receivership estate, $66 million of the award would flow from FDIC, as manager of the FRF, through Security's estate, back to FDIC and into the FRF in satisfaction of the FDIC's subrogated claim. Viewing this circular component of contract damages in isolation from the overall claim, the courts below held it unrecoverable. As the trial court explained: "Because the FDIC, a government agency, is paying itself, the receivership deficit claim is a non-justiciable intra-governmental controversy." App. 40a.

Second, the Federal Circuit held that the claimed positive value of Security (i.e., $44 million) likewise was not recoverable by Security's receivership estate "because it . . . is exceeded by the [FDIC's] $66 million" claim for the Government's own losses. App. 6a. Reasoning that any damages awarded to Security's estate would, under the statutory priority scheme, have to be paid first to satisfy the FDIC's subrogated claim, the court concluded that Petitioners' claimed damages of $44 million would be

consumed entirely by the FDIC's senior subrogated claim of $66 million, leaving nothing for Petitioners for the loss of their thrift. Accordingly, "[t]he [remaining] expectation damage claim is therefore [also] a nonjusticiable intra-governmental dispute because any damage award recovered from the government by the FDIC [as receiver for Security] would flow to the FRF, from one government coffer to another. Thus, the claim lacks adversaries and consequently does not satisfy the Article III, § 2, case or controversy requirement." App. 6a (internal citations omitted).

In other words, according to the courts below, because the Government is barred by Article III from recovering its own contract damages from itself, any damages redressing Petitioners' loss from the Government's breach must first be paid, under the statutory priority scheme, back to the Government to satisfy the very damages that the Government cannot recover from itself. This breathtaking result contradicts this Court's repeated instruction that "'[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. 839, 895 (1996) (plurality opinion)). Beyond that, it makes a mockery of this Court's decision in *Winstar*, all but eviscerating the claims vindicated there whenever the Government's breach inflicted sufficient damage to result in the seizure of the thrift. It is more than passing strange that the Government must pay damages in cases where its breach of contract only maimed, but did not kill, its contracting partner, and yet avoids liability entirely in cases where its actions led to a total loss, all on the theory that the Government's own collateral damage as deposit insurer absolves it of responsibility to the thrift and its owners.

And the effective result of this reasoning is that damages reflecting a loss of $44 million in value owned by

Petitioners ended up in the Government's pockets, even though it was the Government that breached the contract and caused the damage in the first place. This stark result can only be described as a taking of Petitioners' property without just compensation. But the courts below rejected Petitioners' taking claim as well.

I. PROCEDURAL BACKGROUND

Following the enactment of FIRREA, Security brought suit in the District Court for the Southern District of Mississippi seeking an injunction prohibiting the Government from enforcing FIRREA in a manner contrary to Security's contractual rights. The court entered the injunction, holding that the contracts granted Security a right to regulatory capital that survived the enactment of FIRREA. *Security Sav. & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277, 1283-85 (S.D. Miss. 1991). The Fifth Circuit reversed, however, holding that FIRREA was intended to abrogate the contracts and that any claim for compensation must be brought in the Court of Federal Claims ("CFC"). 960 F.2d 1318, 1323 (5th Cir. 1992). The case was transferred to the CFC, which rejected Security's request for injunctive relief for lack of jurisdiction. *Security Sav. & Loan Ass'n v. United States*, 26 Cl. Ct. 1000, 1003-04, *aff'd*, 245 F.3d 1342 (Fed. Cir. 1992). The Office of Thrift Supervision ("OTS") seized Security shortly thereafter. In view of the procedural posture of this case (described below), it must be accepted as true that Security would not have been seized but for the Government's breach, and would have been worth at least $44 million.

FDIC occupies three distinct roles in this lawsuit. First, acting as receiver for and successor-in-interest to Security, FDIC has advanced Security's breach of contract claims as a plaintiff against the United States in the courts below. *See* App. 30a-34a (describing complicated series of intra-governmental transactions by which FDIC obtained control of Security's contract claims). After the

trial court permitted FDIC's predecessor to take over Security's breach of contract claims, Petitioners brought their own action in the Court of Federal Claims, and the suits were subsequently consolidated. App. 31a n.2.[1]

Second, in its capacity as manager of the portion of FRF that received all of the assets and liabilities of the RTC pursuant to 12 U.S.C. § 1441a(m)(1)-(2), the FDIC holds the Government's subrogated claim, with accrued interest, against the Security receivership estate. *See* App. 3a, 34a. Under the statutory priority scheme, the FDIC's subrogated claim is senior to Petitioners, the former shareholders of Security. *See* App. 34a-35a; 12 U.S.C. §§ 1821(d)(11) and (g)(1).

Third, in its capacity as manager of the portion of the FRF that received all of the assets and liabilities of the FSLIC pursuant to 12 U.S.C. § 1821a(a)(1), (a)(2)(A), the FDIC also will be liable to pay any judgment entered against the United States as defendant in this case. App. 35a.

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[1] The Government moved to dismiss Petitioners' breach of contract claim, arguing that the shareholders could not bring a derivative suit because "the FDIC as successor to Security – is bringing suit on behalf of the corporation." App. 65a. The Court of Federal Claims rejected that argument, holding that "'[s]hareholder plaintiffs suing derivatively . . . have a direct, vested interest in the surplus of potential recoveries and, therefore, have standing to remain as plaintiffs in these actions notwithstanding FDIC's intervention on behalf of the failed thrifts.'" App. 65a-66a (quoting *Plaintiffs in All Winstar-Related Cases v. United States*, 44 Fed. Cl. 3, 10 (1999)). The Government challenged this ruling on appeal, but the Federal Circuit apparently rejected the Government's submission as well, for the court ruled on the merits of Petitioners' derivative contract claim, holding summarily that "[b]y its contingent nature, Bailey's contract claim fails with the FDIC's." App. 7a (citing *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1288 (Fed. Cir. 1999)). The court of appeals did hold that Petitioners could not recover directly for breach of contract as third party beneficiaries, *see* App. 6a-7a, and Petitioners do not challenge that ruling here.

In sum, then, in this breach of contract action, the FDIC (i) is a plaintiff in its role as Security's receiver; (ii) has a priority claim on any judgment entered against the United States as a result of its subrogated claim to recover amounts advanced by the FRF to fund the receivership deficit, which arose solely as a direct consequence of the Government's breach of contract; and (iii) is the defendant obliged, in its role as manager of FRF, to pay any judgment entered against the United States for breach of contract.

II. THE COURT OF FEDERAL CLAIMS' DECISIONS

In May 2000, the CFC entered summary judgment as to liability for breach of contract in favor of Petitioners and the FDIC, holding that "Security Savings entered into a contract with the government to permit the thrifts to count supervisory goodwill and certain other items . . . in computing their regulatory capital requirements, and that the passage of FIRREA and its implementing regulations breached those contractual commitments." App. 75a. In two subsequent summary judgment rulings, however, the CFC held that the Government need not pay any damages to either Petitioners or the receivership estate.

A. The Contractual Ruling

Following the completion of discovery, the Government moved for summary judgment as to damages on the contract claims advanced by Petitioners and by FDIC as successor to Security. In December 2001, the CFC granted the motion, holding that the contractual goodwill claims must be dismissed "due to the absence of a case or controversy between [FDIC] and the United States. Consequently, the [Petitioners'] contingent goodwill claims are extinguished." App. 30a. The court reached this holding on the basis of a two-step course of reasoning.

The trial court first held that the receivership deficit, consisting primarily of the $42.6 million subrogated claim advanced by FDIC (with interest, $66 million as of October 31, 2001), could not be recovered as an element of expectancy damages. App. 38a-39a. The court offered two reasons for this conclusion. First, the court accepted the Government's argument that FDIC, as receiver of Security's estate, cannot recover the receivership deficit "because the subrogated claim of the [FDIC] cannot be, properly speaking, a claim of Security Federal, but remains, as it was prior to its liquidation, an obligation of Security Federal to its depositors, which it now owes to the [FDIC] as subrogee." App. 39a-40a. The trial court did not explain how this conclusion could be squared with the assertions of Petitioners and the FDIC (which must be accepted as true on summary judgment) that the FDIC's subrogated claim constitutes a liability of *Security's estate* that was directly and foreseeably caused by the Government's breach, and hence should be recoverable as consequential damages. Indeed, the court simply ignored the fact that, absent the Government's breach of the regulatory capital contract, Security would not have been seized and would have had *positive value*,[2] and the Government's $66 million loss would never have been incurred.

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[2] In the courts below, Petitioners and FDIC advanced a "debanking" theory of expectancy damages that yielded a positive value of $140.4 million for Security Savings through 1998. App. 37a. The courts below rejected this theory for reasons unrelated to the questions presented here, App. 5a; App. 41a-44a, and Petitioners do not seek review of that conclusion from this Court. Rather, Petitioners have advanced the more modest theory of damage, accepted by the CFC in *Suess v. United States*, 52 Fed. Cl. 221, 230-31 (2002), in which the court awarded contract damages based on the franchise value of the thrift, subsequently seized as a result of the Government's breach of contract, at the time of the breach. In this case, the corresponding figure is approximately $44 million.

Second, the trial court held that neither Petitioners nor FDIC could recover the receivership deficit damages as a result of "the FRF's position as both payer of judgments, and as creditor in this action." App. 40a. Because payment of the receivership deficit damages to Security's estate would merely "be a transfer of funds from one portion of the FRF's accounting ledger to another," the court held that "the receivership deficit claim is a non-justiciable intra-government controversy." App. 40a.

Having concluded that the receivership deficit could not properly be included within expectancy damages, the trial court held that Article III barred judicial consideration of the contract claims advanced by FDIC. The court explained that "[t]he subrogated claim of the [FDIC] against Security Federal exceeds the $64 million that remains from FDIC's expectancy damage claim as of year-end 1994, excluding the receivership deficit component which is unrecoverable for the reasons stated above." App. 44a-45a. The court further held that this reasoning extinguished Petitioners' contract claim because, given the court's elimination of the receivership deficit component of expectancy damages, "there is no possibility of any surplus recoveries that they can receive." App. 47a.

B. The Takings Ruling

Following the trial court's ruling on the contract claim, the Government moved for summary judgment on Petitioners' takings claim. Petitioners argued that if Article III, the statutory priority scheme for the distribution of contract damages awarded to a receivership estate, and the FDIC's tri-partite roles as plaintiff-receiver, senior creditor of the receivership estate, and defendant somehow combined to extinguish Petitioners' right to recover contract damages for the loss of the thrift seized as a direct result of the Government's breach, as the CFC had held, then their property had been taken without just compensation. The CFC rejected this argument and granted the

Government's motion for summary judgment. *See* App. 11a-12a.

After holding that Petitioners could not claim that the thrift they owned had been taken, the trial court reasoned that Petitioners' property interest in the potential surplus flowing from Security's contract claim was not taken. Although its prior ruling that the receivership deficit could not be included in expectancy damages had effectively "zeroed out" Petitioners' property interest, App. 23a, the CFC nevertheless held that Petitioners "were never deprived of their property interest in a contractual remedy." App. 24a.

III. THE FEDERAL CIRCUIT'S DECISION

A. The Contractual Ruling

The Federal Circuit affirmed, holding that neither Petitioners nor the FDIC had standing to advance Security's breach of contract claim against the Government. The court ruled that the contract claim was "a nonjusticiable intra-governmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to another. Thus, the claim lacks adversaries and consequently does not satisfy the Article III, § 2, case or controversy requirement." App. 6a (internal citations omitted).

The court reasoned that under the statutory priority scheme, the FDIC's subrogated claim of $66 million would have to be satisfied first out of any expectancy damages awarded against the Government. And because neither the FDIC's contract claim nor Petitioners' $44 million claim for the positive value of the seized thrift[3] exceeded the FDIC's

[3] The Federal Circuit suggested that Petitioners raised the argument that their net contract damages should be the $44 million value of the thrift for the first time on appeal. App. 6a. The court was

(Continued on following page)

$66 million subrogated claim, any damages awarded against the Government would be paid back to the Government. App. 6a. This ruling, in turn, was premised on the court's rejection of Petitioners' (and the FDIC's) argument that the calculation of expectancy damages should include *both* the amount of the receivership deficit *and* the positive value of the seized thrift, given that both losses were caused directly by the Government. Citing its earlier decision in *Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1380 (Fed. Cir. 2001), the Federal Circuit explained that the receivership deficit could not be included in contract damages because "[t]he claim for the recovery of the receivership deficit is predominantly held by the FRF because the largest portion of it is that which was absorbed by the RTC when it paid Security Federal's deposit liabilities." App. 5a.[4]

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mistaken: Plaintiffs asserted claims based on the value of the thrift repeatedly before the CFC. Two of many examples include (a) Shareholder Plaintiff's Opposition to Defendant's Motion for Summary Judgment (8/31/99) at 23 & n.12, 39 & n.23, and (b) Memorandum in Support of Shareholders Plaintiffs Motions For Partial Summary Judgment (12/28/01) at 26-28. In any event, the court of appeals addressed and rejected the argument on the merits. App. 6a. Accordingly, there can be no question that the issue is fully preserved for this Court's review. *See Virginia Bankshares, Inc. v. Sandberg, Inc.*, 501 U.S. 1083, 1098-99 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented.") (citation omitted); *Stevens v. Department of the Treasury*, 500 U.S. 1, 9 (1991).

[4] While the CFC had offered two rationales for its ruling that the receivership deficit could not be included in the contractual expectancy damages claim, the Federal Circuit limited its holding to the second – that it raised a non-justiciable intra-governmental dispute because the receivership estate would be required to pay the first dollars recovered back to the FRF in satisfaction of the Government's subrogated claim. The court of appeals clearly did not rely upon the trial court's first rationale – that the receivership deficit is not includable in expectancy damages as a matter of contract law – for it extended its holding to FDIC's taking claim, *see* App. 7a, a result that only makes sense if the

(Continued on following page)

B. The Takings Ruling

The Federal Circuit also affirmed the judgment against Petitioners on their takings claims. The court rejected Petitioners' claim that the enactment and enforcement of FIRREA in breach of the Government's contractual promise effected a regulatory taking of their thrift, explaining that "[i]t was not the thrift, or its stock, that was allegedly taken, but the contractual right" to regulatory capital. App. 8a (internal citation omitted). Because Petitioners were not parties to the contracts, the court reasoned, they could not advance that claim. "Moreover," the court concluded, "we have already decided that the seizure of thrifts 'for failure to comply with the regulatory requirements imposed by FIRREA' does not constitute a regulatory taking because [Petitioners], through the FDIC, [were] not deprived of a contractual remedy for the government's breach to recover the thrift's assets." App. 8a (quoting *Castle v. United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2572 (2003)).

The court of appeals also rejected Petitioners' claim that their property interest in the surplus had been taken. Although the court acknowledged that Petitioners possessed this property interest, it reasoned that "under the analysis above, the receivership deficit is not available for derivative recovery by [Petitioners]." App. 9a. As a result, "the receivership deficit exceeds the estimated damages award here, [and] there is no recovery for [Petitioners] simply because there is no liquidation surplus." App. 9a.

Federal Circuit had concluded that the claim for recovery of the receivership deficit was non-justiciable under Article III.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARTICLE III JURISPRUDENCE.

Petitioners' interests are indisputably adverse to those of the United States: Petitioners allege (and this Court must accept as true) that an award of contract damages against the United States in an amount calculated to put Security's estate in the position it would have occupied but for the Government's breach would yield a surplus of not less than $44 million payable to Petitioners. Yet the court of appeals held that Petitioners' claim against the Government was extinguished by the intra-governmental dispute doctrine. The court reasoned, first, that the receivership deficit must be excluded from Security's contractual claim on the ground that the Government cannot recover its own $66 million subrogated claim from itself. And because the priority statute requires the receivership estate to pay the Government's $66 million subrogated claim before making any other distributions, an award of $44 million for the value of the seized thrift would have to be paid not to Petitioners, but to the Government itself. So, the court of appeals reasoned, Petitioners' $44 million claim was also an intra-governmental dispute because it was less than the FRF's $66 million subrogated claim. As if by magic, the court of appeals' sleight of hand has made Petitioners' property "vanish[] into thin air." *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960).

The end result of the court's stunning exercise of fuzzy math is that the Government need not pay the damages that would indisputably be due and owing upon the application of ordinary principles of contract law solely because (i) the Government's breach was the direct and foreseeable cause of consequential damages to the Government itself, in addition to the losses suffered by Petitioners; (ii) the Government cannot recover its losses from itself; (iii) the priority statute requires that the Government's own losses be repaid before Petitioners are compensated;

and (iv) a damages award of $44 million for Petitioners' losses would be consumed entirely by the Government's prior subrogated claim of $66 million.

The court below thus analyzed justiciability on a piecemeal basis, asking whether one component of the damages claim presented a non-justiciable intra-governmental dispute rather than examining the whole of the contract claim. This myopic divide-and-conquer focus on one small step in a larger controversy between two adversaries is foreclosed by this Court's leading precedent governing the applicability of the intra-governmental dispute doctrine. In *United States v. Interstate Commerce Comm'n*, 337 U.S. 426 (1949), the United States had brought an administrative proceeding before the Interstate Commerce Commission ("ICC"), claiming that it had been charged excessive railroad rates in violation of the Interstate Commerce Act. The ICC rejected the Government's claim on the merits, and in accordance with the governing statute, the United States brought suit in federal district court against the ICC and against itself. *Id.* at 429. The three-judge district court dismissed for lack of jurisdiction, reasoning that the Government could not sue itself.

This Court reversed. Acknowledging "the long-recognized general principle that no person may sue himself," the Court nevertheless held that substance, not form, governs the issue of justiciability. *Id.* at 430; *see also United States v. Nixon*, 418 U.S. 683, 693 (1974) ("The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."). In substance, "[t]he basic question is whether the railroads have illegally exacted sums of money from the United States." *ICC*, 337 U.S. at 430. The Court recognized that, under the governing statute, "[t]o collect the alleged illegal exactions from the railroads," the Government was required to institute the ICC proceedings and then bring suit against the ICC and itself. But that in

no way changed the substance of the overall controversy: "This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads." *Id.*

Likewise in this case, even though the priority statute requires payment of the subrogated claim to the Government before any distribution is made to Petitioners, the receivership estate's recovery of the receivership deficit as part of expectancy damages from the Government is merely "a step in the proceedings to settle who is legally entitled to sums of money, the Government or [Petitioners]." *Id.* Thus, resolution of the claim advanced by Petitioners and the FDIC that expectancy damages in this case properly include the receivership deficit (for it is foreseeable consequential damage that Security's receivership estate would not have incurred but for the breach) does not constitute "the academic pastime of rendering judgments in favor of persons against themselves." *ICC*, 337 U.S. at 430. Rather, it is an integral step, as in *ICC*, in the proceedings to determine the amount of damages caused to Petitioners as a result of the Government's breach of its contract with Security.

This Court has repeatedly emphasized that "[t]o be cognizable in a federal court, a suit . . . 'must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)). Clearly, Petitioners' derivative breach of contract claim on behalf of Security against the United States – seeking the expectancy damages allegedly owed to the bank, and through the bank to Petitioners, its shareholders – meets these requirements. Article III requires no more, and it certainly does not erect a substantive defense for the benefit of the United States against otherwise meritorious breach of contract claims.

II. THE RULING BELOW EVISCERATES THIS COURT'S DECISION IN *WINSTAR*.

One particularly egregious consequence of the Federal Circuit's decision is that it all but erases this Court's ruling in *Winstar*, negating it in nearly all of those cases (like two of the three before the Court in *Winstar*) in which "the Government exacerbated its breach when it seized and liquidated [the owners'] thrifts for regulatory noncompliance." *Winstar*, 518 U.S. at 870 (plurality opinion). As the plurality recognized, "many institutions [affected by the Government's breach] immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators." *Id.* at 858. Indeed, some 46 *Winstar*-related cases brought in the Court of Federal Claims involved seized thrifts. The decision below effectively ensures that the Government will almost never be held to account for its breach in such cases because the damage it suffered as deposit insurer – the receivership deficit – will largely, if not entirely, eliminate the losses suffered by the owner of the thrift.[5]

The perversity of the result below is perhaps best illustrated by considering its application to the facts in one of the cases before the Court in *Winstar*. Glendale, which "was profitable and well capitalized, with a net worth of $277 million," had acquired Broward, "which then had liabilities exceeding the fair value of its assets by over

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[5] Petitioners are aware of only one seized thrift case that would be spared this perverse result because the receivership ran a modest surplus. *See Republic Savings Bank, FSB v. United States*, No. 92-265C (Fed. Cl.).

It bears noting that in one other case in which a failed thrift originally had a receivership surplus, as soon as the Court of Federal Claims awarded the thrift contract damages that would have flown through to the private shareholders, the Government sought to frustrate that award with an eleventh-hour claim from the IRS alleging that the receivership owed over *$1 billion* in taxes. *See Suess v. United States*, 55 Fed. Cl. 606 (2002).

$734 million." 518 U.S. at 862 (plurality opinion). Thus, on the day of the transaction, "the assumption of Broward's liabilities would have rendered Glendale immediately insolvent by approximately $460 million, but for Glendale's right to count goodwill as regulatory capital." *Id.* at 863. For that reason, the plurality concluded, "[i]t would, indeed, have been madness for respondents to have engaged in these transactions" absent the Government's regulatory capital promise, "for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed." *Id.* at 910.

The Federal Circuit's holding produces an equally mad result: if FIRREA had been enacted the day after the transaction, and Glendale seized as a result, any claim by the owners of Glendale for the loss of their $277 million thrift would be exceeded by the Government's self-inflicted loss of $460 million (a loss that would have been $277 million greater had Glendale not agreed to the transaction). As a result, under the Federal Circuit's reasoning, the claim for recovery of the loss of Glendale's value would constitute a nonjusticiable intra-governmental dispute. The holding below has thus eviscerated the result reached in *Winstar* by concluding that the victims of the Government (i) cannot include its own losses in the thrift's damages claim because it cannot recover damages from itself, but (ii) nonetheless must be reimbursed first for those very losses out of any damages that would otherwise have been recoverable by the non-governmental victims of its breach.

Ordinary rules of contract law, of course, require the opposite result. This Court has long acknowledged the settled rule of contract law that "[o]ne who fails to perform his contract is justly bound to make good all damages that naturally accrue from the breach, and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract." *Miller v. Robertson*, 266 U.S. 243, 257 (1924). Thus, there is no doubt that a party that breaches its contract, understanding that the consequence thereof is to force the other party

into receivership, is ordinarily to be held liable for all natural and foreseeable costs related thereto.[6]

The exclusion of the receivership deficit from expectancy damages cannot be squared with these bedrock principles of contract law. As this case comes to the Court, it must be accepted as true that the Government's breach of its contract with Security directly and foreseeably caused the seizure of the bank, and that, absent the Government's breach, the thrift would have been worth no less than $44 million. Instead, Security's estate is $71 million in the hole. Under this Court's rule that contract claims against the United States are governed by ordinary rules of contract law, *see, e.g., Mobil*, 530 U.S. at 607, Petitioners were entitled to seek the full amount of Security's consequential damages: the difference between the positive value the thrift would have had absent the breach and the negative value it had as a result of the breach.

This result is particularly offensive when one considers that it flows from the combination of the Federal Circuit's misinterpretation of Article III, the FDIC's multiple roles, and the priority statute – so that a contract claim against a *non*-governmental defendant in parallel circumstances would not have been barred. This too contravenes a fundamental premise reaffirmed in *Winstar*:

> An even more serious objection is that allowing the Government to avoid contractual liability

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[6] *See, e.g.*, RESTATEMENT OF CONTRACTS 2d § 351 (1981) ("Loss may be foreseeable as a probable result of breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances . . . that the party in breach had reason to know."); FARNSWORTH ON CONTRACTS 2d § 12.14, at 244 ("The party in breach need not have consented, even tacitly, to be liable for the loss; that party need only have been given notice of the facts that made it foreseeable."); 11-55 CORBIN ON CONTRACTS § 997 (2003) ("If the defendant in fact foresaw the injury and his conduct was planned to induce it, the fact that the train laid by him was a long one is immaterial.").

> merely by passing any "regulatory statute" would flout the general principle that, "when the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

518 U.S. at 895 (plurality opinion) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

At bottom, the courts below permitted the Government to avoid liability by seizing its contractual partner, and then asserting that its own self-inflicted losses barred recovery by its contracting partner's receivership estate. This ruling is utterly irreconcilable with the view articulated in *Winstar*: "[t]he greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence. . . ." 518 U.S. at 898 (plurality opinion).

Finally, the court of appeals' decision in this case is of a piece with a consistent body of post-*Winstar* Federal Circuit jurisprudence that has repeatedly denied plaintiffs any meaningful damages recovery in contravention of bedrock contract principles.[7] This pattern not only negates,

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[7] *See, e.g.*, *Coast Federal Bank v. United States*, 323 F.3d 1035 (Fed. Cir. 2003) (*en banc*) (holding, notwithstanding this Court's recognition in *Winstar* that capital credit promised by government was "permanent . . . credit to . . . regulatory capital," 518 U.S. at 866, that regulatory capital amortized away to zero through offsetting goodwill mechanism); *Castle v. United States*, 301 F.3d 1328 (Fed. Cir. 2002) (denying any restitutionary or reliance recovery to investors in thrift), *cert. denied*, 123 S. Ct. 2572 (2003); *Glass v. United States*, 258 F.3d 1349 (Fed. Cir. 2001) (holding plaintiffs to strict standard for recognition of third-party beneficiary status in government contract cases); *Glendale Federal Bank v. United States*, 239 F.3d 1374 (Fed. Cir. 2001) (refusing to allow restitution award premised upon benefit conferred on government through plaintiff's acquisition of failing thrift); *California Federal Bank v. United States*, 245 F.3d 1342 (Fed. Cir. 2001) (same); *Bank*

(Continued on following page)

piecemeal, this Court's teaching in *Winstar*, it also has broader ramifications, for it will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the costs of its engagements." *Winstar*, 518 U.S. at 884 (plurality opinion).

III. THE RULING BELOW IS CONTRARY TO THIS COURT'S TAKINGS JURISPRUDENCE.

Because it was reasonable for Petitioners to expect that the Government would not seize their property as a direct result of its own breach of contract, Petitioners validly stated a claim for just compensation under this Court's Takings Clause jurisprudence.

1. The Federal Circuit contradicted this Court's jurisprudence in holding that the Government's seizure of a regulated financial institution may not, under any circumstances, constitute a taking of property under the Fifth Amendment. After accurately stating that "Bailey argues that the government effected a regulatory taking *of his thrift* by enacting FIRREA and breaching the assistance agreements," the court of appeals then summarily concluded that "[i]t was not the thrift, or its stock, that was allegedly taken, but the contractual right" held by the thrift itself. App. 8a (internal citations omitted). That is simply not so. Prior to the breach, Petitioners owned property in the form of a thrift worth at least $44 million. As a direct result of the breach, Petitioners' thrift was taken. Thus, Petitioners are *not* seeking just compensation for the loss of property owned by the thrift – namely, the contractual right to treat supervisory goodwill and other assets as regulatory

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United v. United States, Nos. 02-5132 & 02-5137, 2003 U.S. App. LEXIS 19601 (Fed. Cir. Sept. 22, 2003) (unpublished) (rejecting several damages claims asserted by plaintiffs).

capital. Instead, they seek just compensation for the Government's seizure of *the thrift itself* – the entire enterprise – a seizure that would not have occurred but for the Government's breach of its contract with Security. As this Court has confirmed on numerous occasions, it simply cannot be denied that the seizure of an entire enterprise constitutes a taking of property under the Fifth Amendment. *See e.g. United States v. Pewee Coal Co., Inc.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).[8]

To be sure, where the Government seizes an enterprise that is subject to pervasive government regulation, and does so because that enterprise has failed to comply with those regulations, the seizure ordinarily will not trigger a just compensation requirement under the Fifth Amendment. As this Court has made clear, the Government's exercise of its regulatory powers will not give rise to a Fifth Amendment taking unless it violates "reasonable investment-backed expectations." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986). In the main run of cases, when the Government seizes a regulated financial institution for failing to meet its capital requirements, the just compensation requirement of the Fifth Amendment is not triggered because the owner of the institution should have "reasonably expected" that the institution would be subject to regulatory sanctions, including seizure, if it failed to satisfy those requirements.

But that obviously does not mean that there can *never* be a taking of a regulated financial institution. For

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[8] It cannot be the case that the Government can avoid the requirements of the Takings Clause while accomplishing precisely the same result – possession of literally all of the attributes of property ownership – that it sought to accomplish (albeit temporarily) in *Pewee Coal*, simply by seizing legal control over the *whole corporation*, rather than simply by seizing its assets directly.

example, if the Government decided that it must seize and control the largest commercial banks in the country in order to fight the war on terrorism, it cannot possibly be the case that it could avoid paying just compensation to the owners of those banks simply by first passing a regulation raising the applicable capital requirements to unachievable levels. Rather, it would have to pay just compensation to the owners of those banks just as surely as it would if it were seizing car factories or laundries. *See United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Kimball Laundry v. United States*, 338 U.S. 1 (1949). The reason for this is plain: it is entirely reasonable for the owners of financial institutions to expect that the Government will not seize their demonstrably healthy banks without paying just compensation, and will not overhaul the definition of what it means to be a "healthy" institution as a pretext for such seizures of private property.

This Court's regulatory takings cases generally look at three factors: the character of the government action, the economic impact of the regulation on the claimant, and the extent to which the regulation has interfered with reasonable investment-backed expectations *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Connolly*, 475 U.S. at 225. In this case, the first two are obviously satisfied. The "economic impact" of the Government's seizure of Security was the immediate loss of the whole of Petitioners' property – a thrift worth at least $44 million. And the "character of the government action" in this case was an old-fashioned seizure of property, albeit for regulatory purposes. The governing inquiry is therefore whether Petitioners had a reasonable, investment-backed expectation sufficient to render the Government's seizure a compensable taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (regulation that goes "too far" will effect a taking).

Here, it bears repeating, but for the Government's breach of its regulatory capital contract, Security would not have been seized and Petitioners would still own the thrift today. Petitioners plainly had a reasonable, investment-backed expectation that the Government would not seize their thrift based solely upon regulatory noncompliance that was directly caused by the Government's breach of its regulatory capital contract. Petitioners reasonably expected that the Government either would keep its word, or, at a minimum, would promptly compensate the thrift for any breach of its promise, so as to prevent the thrift from falling out of regulatory compliance and becoming subject to seizure solely as a result of the breach.

This Court has consistently held that when the Government has itself *induced* reasonable investment-backed expectations, it must provide just compensation if it frustrates those expectations by subsequent changes in its policy. For example, the question in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), was whether the Government was free, without paying just compensation, to require open public access to a privately owned man-made pond. The owner of the pond had dredged it, converted it to a marina, and connected it to the navigable waters of the United States in reliance on the expectation that the pond and marina would remain private. The Court held that the federal government's subsequent creation of a public right of access to the pond, though an otherwise constitutional exercise of its pervasive power to regulate in navigable waters, constituted an uncompensated taking in violation of the Fifth Amendment.

Critical to this Court's judgment was the fact that the government agency, the Army Corps of Engineers, had awarded a dredging permit and allowed this costly project to go forward to completion before it demanded that free public access be provided. Although the background rule was that all waters connected to a navigable waterway were subject to a navigable servitude, the Court concluded

that the conduct of the Army Corps of Engineers created an expectation protected by the Takings Clause:

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation [in the adjacent waters], or could have conditioned its approval of the dredging on [the owners'] agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what [the owners] now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States . . . , it can lead to the fruition of a number of expectancies embodied in the concept of "property" – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.

Id. at 179 (internal citations omitted).

Unlike this case, *Kaiser Aetna* did not even involve a specific, bargained-for Government *promise* that the owner of the pond would be permitted to bar public access. Rather, the Government merely failed to condition its dredging permit on open public access or to otherwise disabuse the pond owner of its expectation, justifiably held at the time of the investment, that the pond would remain private. This failure was held sufficient to justify the owner's expectation that it would retain the property rights, including the right to exclude, that it clearly owned at the time of the investment. By contrast, Petitioners relied upon explicit contractual promises made by the Government to Security, which served to provide Petitioners with a concrete Government assurance that Security's

regulatory capital would be determined in accordance with the contract.[9]

Kaiser Aetna forecloses any claim that an investment premised on the Government honoring its express contractual promise entails the investor's assumption of a risk of noncompensable Government breach. If a property owner is protected by the Fifth Amendment even where there is no explicit Government contract, surely the property owner is entitled to just compensation when the Government's inducement came in the form of an express agreement, used by the Government to persuade the property owner to put its entire enterprise at risk based upon the reasonable expectation that the Government would keep its word.

Similarly, *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), involved abrogation of Monsanto's government-induced expectation that the trade secrets it submitted to the EPA in the course of seeking registration for a new pesticide would not be disclosed to others. The Court found these expectations "overwhelming," and held that they alone "dispose[] of the taking question." *Id.* at 1005. The Court explained:

> [T]he Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation. If EPA . . . were now to disclose trade-secret data . . . EPA's actions would frustrate Monsanto's reasonable

[9] It is also noteworthy that, like the instant case, *Kaiser Aetna* involved an area pervasively regulated by the federal government: under the Commerce Clause, the long-established rule is that all waters connected to a navigable waterway are automatically subject to comprehensive regulations by federal authorities. 444 U.S. at 173.

> investment-backed expectation with respect to its control over the use and dissemination of the data it had submitted.

Id. at 1011.

The "explicit governmental guarantee" in *Monsanto* came in the form of a statutory scheme expressly providing that any qualifying trade secret information submitted to EPA would be protected from public disclosure by EPA. In other words, the decision in *Monsanto* protected a claimant that relied on nothing beyond a guarantee given to the public at large, rather than one made directly in a bilateral agreement with the claimant. Since Petitioners relied upon the *express contracts* between the Government and Security, rather than merely upon a general representation to the public, they clearly have an even stronger and more demonstrably reasonable investment-backed expectation than did the claimant in *Monsanto*.

In sum, by failing even to analyze whether Petitioners had a reasonable, investment-backed expectation that the Government would not seize their bank as a direct result of its own breached promise, the court of appeals ruled in direct defiance of this Court's Takings Clause jurisprudence.

2. The Federal Circuit also departed from this Court's Takings Clause precedents in holding that "the seizure of thrifts 'for failure to comply with the regulatory requirements imposed by FIRREA' does not constitute a regulatory taking because [Petitioners], through the FDIC, [were] not deprived of a contractual remedy for the government's breach to recover the thrift's assets." App. 8a (citation omitted). In other words, the court held that Petitioners' property was not taken because they are entitled to recover the value of their property through the thrift's contract damage action against the Government – pursued by the FDIC as receiver.

As an initial matter, the Government's obligation to pay just compensation to Petitioners obviously cannot be

constitutionally satisfied through a contract damages action that is itself controlled *by the Government*, in the form of the very agency – the FDIC – that would be obligated to pay any judgment owed to Petitioners. This Court has made clear that any remedial system for determining the just compensation owed to parties whose property has been taken must be "'reasonable, certain, and adequate.'" *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (citations omitted). A damages suit controlled by the very agency that caused the taking in the first place, and that would be required to pay any judgment, is hardly "reasonable, certain, and adequate." As Justice Jackson once put the point, in an opinion for the Court emphasizing that a bankruptcy trustee's conflict of interest with the bankrupt estate cannot be tolerated, "[t]his is not because such interests are always corrupt but because they are always corrupting." *Mosser v. Darrow*, 341 U.S. 267, 271 (1951).[10]

Moreover, as the Federal Circuit recognized, Petitioners had a property interest in the potential liquidation surplus of Security. At an absolute minimum, if Article III and the statutory priority scheme combine, as the Federal Circuit held, to effectively eliminate a liquidation surplus that would otherwise have flowed to Petitioners, they have suffered an independent taking of their property interest in the liquidation surplus, for which just compensation must be paid.

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[10] It would be a violation of the Due Process Clause for the government to compel a litigant to rely on a government agency as that litigant's exclusive legal representative in a case against the government itself. *Cf. Ward v. Village of Monroeville*, 409 U.S. 57, 61-2 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). In our adversary system, one's legal representative is supposed to be not merely neutral, but one's wholly committed *advocate*.

Again, it must be accepted as true that the Government's breach of contract foreseeably and directly caused the regulatory noncompliance and consequent seizure of a thrift institution then worth at least $44 million. It follows, under ordinary principles of contract law, that Petitioners' property interest in the liquidation surplus would have to be worth approximately $44 million. As explained above, the thrift's ordinary contract remedy against the Government would necessarily include *all* elements of damage foreseeably caused by the breach: the $44 million value of the seized thrift *plus* any damage caused to the Government, as deposit insurer, by its own breach, thereby allowing the $44 million to flow through to Petitioners as Security's receivership surplus.

This point can be brought into sharp focus by considering the implications of the following statute, hypothetically enacted as part of FIRREA:

> In any proceeding brought in the Court of Federal Claims to recover money damages for any loss foreseeably and directly caused by a breach of contract found to result from the provisions of this Act, any judgment awarding damages shall be reduced in an amount equal to the net liquidation costs and any other expenses incurred by the United States in connection with any receivership of a thrift institution seized as a result of the breach of contract.

The passage of such a statute would necessarily constitute a taking of Petitioners' property interest in the liquidation surplus of Security. The Federal Circuit's decision interprets Article III and the statutory priority scheme in a manner that accomplishes precisely this result; thus, if that interpretation is upheld, Petitioners' property interest in the liquidation surplus has necessarily been taken.

3. The Federal Circuit's takings analysis is also directly contrary to this Court's seminal decision in *Armstrong v. United States,* 364 U.S. 40 (1960). The *Armstrong*

petitioners had a state law lien for materials furnished to a government contractor. The contractor defaulted on its contract with the United States, which demanded that the contractor transfer the materials to the Government. The transfer rendered the liens unenforceable – under the special rule that the Government and its property are immune from suit. The lienholders argued that destruction of the lien constituted a taking, and the Court agreed:

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens. . . .

Armstrong, 364 U.S. at 48-49 (emphasis added).

Here, much as in *Armstrong*, Petitioners' property interest – whether viewed as the thrift itself or as the liquidation surplus – "vanished." As in *Armstrong*, the Government applied, "for its own advantage," the special rule arising from the Federal Circuit's understanding of Article III and the priority statute to pay the losses it inflicted on itself rather than those it inflicted on Petitioners – "something that the government could do . . . but

which no private [defendant] could do." *Armstrong* teaches that this course of action was a taking, whether accomplished with "an intent and purpose . . . or not," since the effect was to appropriate Petitioners' property for a public purpose – reducing the Government's share of the damages which were caused by its own breach.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

January 26, 2004

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02-5170, 03-5005

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

341 F.3d 1342

August 27, 2003 Decided

COUNSEL: Alan W. Perry, Forman Perry Watkins Krutz & Tardy, PLLC, of Jackson, Mississippi, argued for plaintiffs-appellants. Of counsel on the brief were Mary C. Gill and Craig H. Kuglar, Alston & Bird, LLP, of Atlanta, Georgia; and Laurence H. Tribe, Ralph S. Tyler Professor of Constitutional Law, Harvard University Law School, of Cambridge, Massachusetts.

John V. Thomas, FDIC Legal Divison [sic], Federal Deposit Insurance Corporation, of Washington, DC, argued for plaintiff-appellant. With him on the brief were Richard M. Schwartz, John M. Dorsey, III, and Richard S. Gill.

David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Stuart E. Schiffer, Deputy Assistant Attorney General; Jeanne E. Davidson, Deputy Director; Daniel D. McClain, and William F. Ryan, Trial Attorneys.

JUDGES: Before MAYER, Chief Judge, MICHEL and PROST, Circuit Judges.

OPINION BY: MAYER

OPINION: MAYER, Chief Judge.

H.C. Bailey, Jr., et al. (collectively "Bailey") and the Federal Deposit Insurance Corporation ("FDIC") appeal the judgment of the United States Court of Federal Claims dismissing their contract damages and Fifth Amendment takings claims. *Fed. Deposit Ins. Corp. v. United States,* 51 Fed. Cl. 265 (2001); *Fed. Deposit Ins. Corp. v. United States,* 53 Fed. Cl. 31 (2002); *Bailey v. United States,* 53 Fed. Cl. 251 (2002). Because the court correctly determined that neither party's claims allege an Article III case or controversy or *Fifth Amendment* taking, we affirm.

Background

This is a Winstar-related case. In 1984, Security Savings and Loan Association ("Security Savings") acquired a failing thrift, New North Mississippi Federal Savings and Loan Association. *See Fed. Deposit Ins. Corp. v. United States,* 47 Fed. Cl. 2, 5 (2000). Bailey is a shareholder of Security Savings. In 1985, Bailey Mortgage Company, a subsidiary of Security Savings, acquired another failing thrift, Security Trust Federal Savings and Loan Association of Oak Ridge, Tennessee. In both transactions, the Federal Savings and Loan Insurance Corporation ("FSLIC") provided regulatory forbearances in assistance agreements whereby, inter alia, supervisory goodwill, cash contributions, and income capital certificates could be counted toward regulatory capital requirements.

After the passage of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub.L.

No. 101-73, 103 Stat. 183 (1989), and its implementing regulations, Security Savings could not meet its regulatory capital requirements and was seized by the Office of Thrift Supervision in 1992. The assets of Security Savings were passed to a new institution, Security Federal Savings and Loan Association ("Security Federal"); and the Resolution Trust Corporation ("RTC") became its receiver. *See* 12 U.S.C. § 1441a(b)(4)(A) (2000). In April of 1994, the RTC liquidated Security Federal and provided approximately $84.3 million in additional funds to cover deposit liabilities. This subrogated claim, the rights of which were now owned by the RTC, stood at $42.6 million in 1998 and $66.4 million as of October of 2001. The RTC was terminated in 1995 and its assets, including the subrogated claim, were transferred to the FSLIC Resolution Fund ("FRF"), *id.* § 1441a(m)(1)-(2), managed by the FDIC, *id.* § 1811(a)-(b). The FDIC also became the receiver of Security Savings' deficit, the "receivership deficit." *Id.* This deficit, which includes the subrogated claim owned by the FRF and other expenses including FDIC operating expenses, and taxes, totaled $68.2 million as of December of 1998, and with interest was $71.1 million as of December of 2000.

The FDIC and Bailey filed suit in the Court of Federal Claims against the United States for breach of the assistance agreements with the FSLIC by the enactment of FIRREA. In May of 2000, the court ruled that the government had breached its contracts with Security Savings, and that Bailey had a direct interest in any surplus recovery by the FDIC. *Fed. Deposit Ins. Corp.*, 47 Fed. Cl. at 4. The FDIC and Bailey submitted summary judgment motions with respect to damages under breach of contract and Fifth Amendment takings theories. The court dismissed

the FDIC's and Bailey's contract damages claims for lack of Article III standing and declined to bifurcate the FDIC's and Bailey's contract claims, *Fed. Deposit Ins. Corp.*, 51 Fed. Cl. at 273, 276; dismissed the FDIC's Fifth Amendment takings claim for lack of *Fed. Deposit Ins. Corp.*, 53 Fed. Cl. at 32; and dismissed Bailey's takings claim because Bailey had not been deprived of a contractual remedy. *Bailey,* 53 Fed. Cl. at 257. Bailey and the FDIC appeal and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

Discussion

We review a grant of summary judgment by the Court of Federal Claims *de novo. Hercules Inc. v. United States,* 292 F.3d 1378, 1380 (Fed. Cir. 2002). We will affirm such a grant "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Barseback Kraft AB v. United States,* 121 F.3d 1475, 1479 (Fed. Cir. 1997).

I.

The FDIC and Bailey argue that they may recover expectancy damages of $208.6 million. This figure represents the receivership deficit of $68.2 million and the estimated value of Security's assets in the absence of the breach of the assistance agreements of $140.4 million in 1998, under a "debanking" theory. They assert that the court made two legal errors in its damages calculation.

First, they argue that the court erred by excluding the receivership deficit from the potential damages award. They contend that this liability is unfairly double-counted: counted once because it may not be recovered from the

government, and counted a second time because it must be repaid. This theory fails, however, because it is premised on the false assumption that the receivership deficit is an asset available for recovery by the FDIC for Security Savings. The claim for the recovery of the receivership deficit is predominantly held by the FRF because the largest portion of it is that which was absorbed by the RTC when it paid Security Federal's deposit liabilities. *See Landmark Land Co. v. Fed. Deposit Ins. Corp.*, 256 F.3d 1365, 1380 (Fed. Cir. 2001) ("[T]he government holds a claim against [the thrift] for an . . . amount paid by the RTC to [the thrift's] depositors . . . ."); *id.* at 1381 ("It is undisputed that [the failed thrift] owes the FRF over $1.5 billion for the advances that the FRF made to [the thrift's] depositors upon its liquidation.").

The FDIC and Bailey then argue that the court erred by rejecting Bailey's hypothetical "debanking" damages of approximately $140 million positive equity in 1998 and limiting it to $64 million as of 1994. The FDIC and Bailey explain that the non-breach provisions of FIRREA would have prevented Security Savings from continuing to engage in the thrift business while maintaining direct investments in real estate. They posit that Security Savings would have, inter alia, exited the thrift business and sold its retail banking deposits and branch offices in 1994, and established a holding company for direct investments in real estate and financial institutions. They assert that the present value of the hypothetical assets, $140 million at the estimated time of trial, is recoverable. The court reasoned that such a hypothetical holding company would not have retained the benefits of the assistance agreements after selling the thrifts, and that

therefore the government's contract liability to Security Savings would have ceased in 1994.

We decline to ruminate on the foreseeability of these "debanking" damages, but even if we accepted the theory, we agree with the court that the damages award must be assessed as of the time the bank would have ceded the benefit of the regulatory forbearances. *See Cal. Fed. Bank v. United States,* 245 F.3d 1342, 1349 (Fed. Cir. 2001) ("Profits on the use of the subject of the contract itself, here supervisory goodwill as regulatory capital, are recoverable as damages.") (emphasis added). Consequently, the breach of contract damages must be capped at the alleged 1994 figure of $64 million.

Neither Bailey nor any other private creditor could benefit if the FDIC fully recovered its alleged contract damage claims because the maximum potential award of $64 million is exceeded by the FRF's subrogated claim of $66 million. On appeal, Bailey asserts for the first time that he should be compensated $44 million, the value of the thrift in 1989. But this does not help him because it also is exceeded by the $66 million. The expectation damage claim is therefore a nonjusticiable intra-governmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to another. *Landmark,* 256 F.3d at 1382. Thus, the claim lacks adversaries and consequently does not satisfy the Article III, § 2, case or controversy requirement. *Id.* The FDIC was properly dismissed for lack of standing.

Bailey does not contest the FDIC's dismissal, but asserts that he should be able to recover any surplus of expectancy damages directly from the government. This

claim, however, must be brought by the FDIC because Bailey in his capacity as a shareholder was not party to the assistance agreements. *See Glass v. United States,* 258 F.3d 1349, 1355 (Fed. Cir. 2001) ("Because the shareholders did not stand to directly benefit under the contract, they are at most incidental beneficiaries of the contract with no rights to enforce the contract against the United States."). By its contingent nature, Bailey's contract claim fails with the FDIC's. *See First Hartford Corp. Pension Plan & Trust v. United States,* 194 F.3d 1279, 1288 (Fed. Cir. 1999) (Shareholders possess "contingent interest in a liquidation surplus.").

II.

The FDIC argues that Security Savings as a viable entity was taken on August 9, 1989 with the passage of FIRREA. It theorizes that it may recover $64.5 million: the value of the thrift at the time, $14.8 million in equity and its receivership deficit of approximately $49 million. The FDIC contends that with interest the total exceeds $74 million. Under the analysis above, however, the receivership deficit may not be included in any recovery by the FDIC for Security Savings. And the remaining $14.8 million is exceeded by the amount owed to the FRF. Thus, the takings claim is also an intra-governmental claim, and was properly dismissed for lack of Article III standing.

Bailey argues that the court erred by rejecting his Fifth Amendment per se and regulatory takings theories. He argues that the government effected a per se taking of the thrift by enacting FIRREA and by seizing it in 1992. But "it is well established that it is not a taking for the government to close an insolvent bank and appoint a

receiver." *Branch v. United States,* 69 F.3d 1571, 1575 (Fed. Cir. 1995). We look to the cause of the insolvency, *see id.,* to determine whether the change in accounting treatment for goodwill constituted a per se taking, and conclude that it did not. We have already rejected the theory that regulatory assessments of liability fall into the category of per se takings. *Id.* at 1575 (rejecting the assertion that the seizure of a sister bank of a failed thrift under a cross-guarantee provision of FIRREA constituted a per se taking). And the same analysis appertains here. *See id.* at 1576 ("The principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability.").

Alternatively, Bailey argues that the government effected a regulatory taking of his thrift by enacting FIRREA and breaching the assistance agreements. It was not the thrift, or its stock, that was allegedly taken, *see First Hartford Corp.,* 194 F.3d at 1286, but the contractual right to treat goodwill, cash contributions, and income capital certificates as tangible assets. Bailey was not party to the assistance agreements; therefore this theory of an alleged taking of the contract is contingent and must be asserted by the FDIC. *See Glass,* 258 F.3d at 1355; *Castle v. United States,* 301 F.3d 1328, 1338-39 (Fed. Cir. 2002). Moreover, we have already decided that the seizure of thrifts "for failure to comply with the regulatory requirements imposed by FIRREA" does not constitute a regulatory taking because Bailey, through the FDIC, was not deprived of a contractual remedy for the government's breach to recover the thrift's assets. *Castle,* 301 F.3d at 1341; *id.* at 1342 (FIRREA did not take the FSLIC contract with the thrift because it "did not deprive the plaintiffs from a contractual remedy . . . plaintiffs retained the

full range of remedies associated with any contractual property right they possessed.").

Bailey, nevertheless, argues that his inability to recover the receivership deficit in combination with the statutory depositor preference priority scheme takes his contractual remedy to any surplus recovery. Bailey is correct that he has a property interest in any liquidation surplus. *See First Hartford Corp.,* 194 F.3d at 1287-88 (Shareholder possesses a cognizable property interest in eventual liquidation surplus arising under depositor preference statute whereby the receiver is directed to transfer any remaining funds to the depository institution's shareholders.). But under the analysis above, the receivership deficit is not available for derivative recovery by Bailey; and the application of the statutory priority scheme does not take his property interest in the surplus or his right to pursue the remedy. To the contrary, the statute preserves the right of the shareholders to a potential recovery, 12 U.S.C. § 1821(d)(11)(A)(v), and the FDIC has avidly pursued contract damages on behalf of Security Savings. But because the statute directs the receiver to repay receiver expenses, and other obligations subordinated to depositors or general creditors before the shareholders, *id.* § 1821(d)(11)(A)(i)-(iv), and the receivership deficit exceeds the estimated damages award here, there is no recovery for Bailey simply because there is no liquidation surplus.

Conclusion

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED.

H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.

Nos. 92-577 C & 92-817 C (consolidated)

UNITED STATES COURT OF FEDERAL CLAIMS

53 Fed. Cl. 251

August 14, 2002, Filed

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JUDGES: EDWARD J. DAMICH, Chief Judge.

OPINION BY: EDWARD J. DAMICH

DAMICH, Chief Judge.

Before the Court are the Shareholder Plaintiffs' motion for partial summary judgment on their taking claim and Defendant's cross-motion for summary judgment as to the Plaintiffs' taking claim. On April 12, 2002, the Court granted Defendant's cross-motion as to takings with respect to the Federal Deposit Insurance Corporation ("FDIC") and dismissed the FDIC from the consolidated proceedings. For the reasons discussed below, the Shareholder Plaintiffs cannot establish that any property right was taken. Therefore, the Shareholder Plaintiffs' motion

for partial summary judgment is DENIED and Defendant's motion for summary judgment is GRANTED.

I. Background

This is a long-standing *Winstar*-related case. The remaining plaintiffs are the shareholders of the failed Security Savings and Loan Association of Jackson, Mississippi ("Security Savings"). Previously, this Court has held that the Federal Savings and Loan Insurance Corporation ("FSLIC") breached contractual obligations that permitted Security Savings to count supervisory goodwill and certain other items, including FSLIC cash contributions and income capital certificates ("ICCs"), in computing its regulatory capital requirements. These contractual commitments were breached by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, and its implementing regulations. These contracts are discussed in further detail in the Court's opinion in *F.D.I.C. v. United States,* 47 Fed. Cl. 2, 4-5 (2000) ("*FDIC I*"). The Shareholder Plaintiffs have standing in this case to pursue their "direct, vested interest in the surplus of potential recoveries." *F.D.I.C. I,* 47 Fed. Cl. at 6 (quoting *Plaintiffs in All Winstar-Related Cases at the Court v. United States,* 44 Fed. Cl. 3, 10 (1999)). The FDIC appeared in this case as the successor-in-interest to Security Savings.

On December 21, 2001, this Court held that both the FDIC and the Shareholder Plaintiffs could not pursue their contractual claims. *F.D.I.C. v. United States,* 51 Fed. Cl. 265 (2001) ("*FDIC II*"). The FDIC lacked standing because, as manager of the FSLIC Resolution Fund ("FRF") which owns the damages claim of the failed

Security Savings and is also the largest creditor of the Security receivership, it could not present any theory of damages in its contractual claim that exceeded the FRF's subrogated claim against the Security receivership. *FDIC II,* 51 Fed. Cl. at 272-73. The FDIC damages claim did not exceed the FRF's claim against Security because, in part, the FDIC also could not recover for the receivership deficit of Security. The receivership deficit consists of the shortfall that occurred after Security Federal Savings and Loan Association ("Security Federal") – the successor of Security Savings that was operated under Resolution Trust Corporation ("RTC") conservatorship – was liquidated and after the RTC made deposit insurance payments for the benefit of the former depositors of Security Federal plus interest and tax liability. *FDIC II,* 51 Fed. Cl. at 269-70.

Because the FDIC lacked standing to pursue its damages claim, no surplus of recovery existed. Therefore, the Court ruled that the Shareholder Plaintiffs' contract claim, which was predicated on the existence of surplus recoveries, was extinguished. *FDIC II,* 51 Fed. Cl. at 273.

On April 12, 2002, this Court held in an unpublished opinion that the FDIC did not possess standing to pursue its taking claim because it could not present any theory of damages in its taking claim that exceeded the FRF's subrogated claim against the Security receivership. In addition, in the absence of contestation of the FDIC, the Court also dismissed the FDIC's due process claim against Defendant. The Shareholder Plaintiffs' taking claim is the only claim remaining in these consolidated proceedings.

II. Shareholder Plaintiffs' Taking Theory

The Shareholder Plaintiffs present an unusual taking claim in which the interaction of certain provisions of FIRREA, the statutory priority scheme set forth in 12 U.S.C. § 1821(d)(11)(A) in which proceeds from failed thrifts collected by the FDIC, as manager of the FRF, are distributed, and several decisions by the U.S. Court of Appeals for the Federal Circuit and the Court of Federal Claims which have held that the FDIC cannot recover damages that are owed to the FRF, such as the receivership deficit,[1] combined together resulted in the taking of the contractual remedy to which the Shareholders were entitled. First, as stated above, FIRREA and its implementing regulations breached FSLIC's contractual obligation to Security Savings' goodwill claims. In addition, FIRREA abolished the breaching party in this case, FSLIC, and all of its assets and liabilities were transferred to its successor, the FSLIC Resolution Fund ("FRF"). 12 U.S.C. § 1821a(a)(1), (a)(2)(A). At the same time, FIRREA provided that, upon the termination of the RTC which previously owned the claims of Security Federal in this case, the FRF would also by operation of law own Security's breach of contract claim against the Government. 12 U.S.C. § 1441a(m)(1)-(2). The FRF is managed by the FDIC in its corporate capacity. 12 U.S.C. § 1811, 1821a(a)(1). Thus, FIRREA required the FDIC to assume conflicting roles in this case by controlling both the

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[1] *See Glass v. United States*, 258 F.3d 1349 (Fed. Cir.2001); *Landmark Land Co. v. United States*, 256 F.3d 1365 (Fed. Cir.2001); *Statesman Sav. Holding Corp. v. United States* 41 Fed. Cl. 1 (1998); *Hansen Bancorp, Inc. v. United States*, 49 Fed. Cl. 168, 177, n.12 (2001).

interest of the breaching party (FSLIC), and the interest of the breached party (Security Savings). In other words, the FDIC, as manager of the FRF, is in effect on "both sides of the 'v'" in this case.

To compound matters, the FRF also is the largest creditor of the Security receivership because it paid off Security's depositors when Security Federal was liquidated. As of December 21, 2002, the claim of the FRF against the Security receivership was approximately $66.4 million. *FDIC II,* 51 Fed. Cl. at 268. Thus, if a judgment were to be obtained against the Government in this case, the FDIC would distribute the proceeds in accordance with the statutory priority scheme. The priority scheme provides as follows:

> **(11) Depositor Preference**
>
> **(A) In general**
>
> Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:
>
> (i) Administrative expenses of the receiver.
>
> (ii) Any deposit liability of the institution.
>
> (iii) Any other general or senior liability of the institution (which is not

> a liability described in clause (iv) or clause (v)).
>
> (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
>
> (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

12 U.S.C. § 1821(d)(11)(A).

Thus, if the FDIC obtained a judgment on its contract claims, first, pursuant to a contract of sale by which the RTC obtained Security's goodwill claims from the Security receivership, the FDIC would first pay the FRF the expenses it incurred in pursuing the goodwill claim, such as attorney's fees and any advances the FRF made to Security, including any interest. Def.'s Response to Order to Show Cause at App. 150-54. *See also* 12 U.S.C. § 1821(d)(11)(A)(i); 12 C.F.R. § 360.3(a)(1). Then, pursuant to the statutory priority scheme, the FDIC would use excess monies to pay the FRF for the deficit it incurred by paying off Security's depositors, including interest. 12 U.S.C. § 1821(d)(11)(A)(4); 12 C.F.R. § 360.3(a)(6), (7). Then, the FDIC would distribute remaining funds, if any, to other creditors of the Security Federal receivership pursuant to the statutory scheme. If any funds remained, these funds would be distributed to the Security Savings pass-through receivership pursuant to the October 16, 1992 purchase and assumption agreement between the

pass-through receivership and the RTC. Def.'s Response to Order to Show Cause at App. 125-26. The pass-through receivership has "subordinated debt" in the amount of $7,040,000 which mostly corresponds to $7 million in ICCs which would have to be satisfied. Pl's Mot. for Partial Summ.J. as to Takings at App.Ex 1, 14. Finally, if any funds remained, the shareholders of Security Savings would be the final creditors paid by the pass-through receivership. 12 U.S.C. § 1821(d)(11)(A)(v).

No other creditor is on a par with the FRF. Consequently, the FDIC would pay itself, as manager of the FRF and as receiver, in the amount of about $75 million. This amount includes (a) $66.4 million owed to the FRF as of October 31, 2000; (b) $7 million owed by the pass-through receivership to pay ICCs and (c) $1.7 million in expenses. See Def.'s Response to Order to Show Cause at App. 159-167. Barring a district court order to the contrary, the FDIC will use all of the funds to pay its own expenses and claims leaving the Shareholder Plaintiffs with no recovery if any judgment obtained in this case did not exceed the amount that the FDIC intended to pay itself.[2]

Any possibility that a judgment would exceed the amount that the FDIC intended to pay itself was thwarted by this Court's holding that the FDIC could not recover for the receivership deficit of Security Federal. The FDIC could not recover for the receivership deficit for two

[2] The Shareholder Plaintiffs argue that judicial review of the FDIC's acts as receiver might be precluded by 12 U.S.C. § 1821(d)(13)(D). Whether or not this Court even has the jurisdiction to make such a holding, it is unnecessary for the resolution of the parties' takings claims to consider this issue.

reasons. The first basis for denying recovery for the receivership deficit was because the FDIC has been vested with conflicting statutory roles in this case: its duty as successor to the receiver of Security Savings, 12 U.S.C. § 1441a(m)(1); as owner of the claims of Security Federal as manager of FRF-RTC, 12 U.S.C. § 1441a(m)(2); and as successor to the obligations of the breaching party FSLIC; and in its role as manager of FRF-FSLIC, 12 U.S.C. § 1821a(a)(1). *FDIC II,* 51 Fed. Cl. at 269-272. These conflicting roles demonstrated that any recovery of the receivership deficit obtained by the FDIC would signify nothing more than a payment from one pocket of the FRF to another pocket of the FRF, thereby presenting this Court with a nonjusticiable intra-governmental controversy. The second basis for the Court's holding was that the receivership deficit, representing the loss absorbed by the RTC when it payed off Security Federal's depositors, was never a proper claim of Security Federal. Insofar as the standing of FDIC in this case was predicated upon its status as successor-in-interest and not on its status as Security Federal's deposit insurer, the FDIC was not in the position to claim the receivership deficit. *Id.* at 270.

Because the FDIC was unable to pursue payments for the receivership deficit of Security, the dominos then began to fall. The FDIC was deprived of standing to pursue Security's contract claims because it was unable to pursue any theory of damages in which the FRF would pay anyone other than itself. Because the FDIC lacked standing to pursue the contract claims of Security, the Shareholder. Plaintiffs claim was extinguished for the lack of any surplus recovery. Thus, so the Shareholder Plaintiffs argue, the statutory priority distribution scheme combined with the conflicting roles of the FDIC in this case deprived

them of any contractual remedy to which they may have been entitled. Thus, the Shareholder Plaintiffs argue that their property right to a contractual remedy in this case was taken, and that they are entitled to just compensation under the Fifth Amendment.

The Shareholder Plaintiffs' theory offer two alternative theories describing which apparent property rights of theirs were taken. First, they argue that the property taken was the corporation of Security Savings itself because the corporation constitutes property of the shareholders under Mississippi law. Mississippi's corporate statute defines a "share" as "the unit into which the proprietary interests in a corporation are divided." Miss. Code Ann. § 79-4-1.40(22) (1972). Second, in the alternative, the Shareholder Plaintiffs argue that there has been a taking of the liquidation surplus, the Shareholders' rights in the contract claim of Security Savings.

IV. Standard for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); *Jay v. Secretary, DHHS,* 998 F.2d 979, 982 (Fed. Cir. 1993). The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. After adequate time for discovery and on motion, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, where that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-54, 91 L. Ed. 2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.,* 145 F.3d 1303, 1307 (Fed. Cir. 1998), and draw all reasonable inferences in its favor. *See Gasser Chair Co. v. Infanti Chair Mfg. Corp.,* 60 F.3d 770, 773 (Fed. Cir. 1995).

V. Analysis

It is well established that, generally, governmental inference with a contractual right does not give rise to a taking, but instead entitles a plaintiff to seek compensation for breach of contract. *See Sun Oil Co. v. United States,* 215 Ct. Cl. 716, 572 F.2d 786 (1978). "Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than its sovereign capacity. Accordingly, remedies arise from the contracts themselves, rather than from the constitutional protection of private property rights." *Hughes Communications Galaxy, Inc. v. United States,* 271 F.3d 1060, 1070 (Fed. Cir. 2001) (citations omitted). However, the U.S. Supreme Court has suggested that, in certain circumstances when a plaintiff has been deprived of its right to a contractual remedy by the Government, it can bring a Fifth Amendment taking claim for the deprivation of the contractual remedy. In *Lynch v. United States,* 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934), a claim against the Government was brought by beneficiaries of contracts for war risk insurance by the Federal Government during World War I, in which the Government was an insurer for persons against death or disability sought payments. During the Great

Depression, Congress passed the Economy Act of 1933 which repealed "all laws granting or pertaining to yearly renewable term insurance." *Id.* at 575. This provision, in effect, breached the insurance contract for which plaintiffs were in privity of contract. A separate statutory provision withdrew the Government's consent to be sued over the policies. *Id.* at 587. The Supreme Court held that because the Government withdrew its consent to be sued, the beneficiaries might have takings claims against the Government because contracts with the Government are a property right within the meaning of the Fifth Amendment, though ultimately the beneficiaries' claims proceeded on due process grounds. *Id.* at 579. Thus the Takings Clause could be implicated in a situation when the Government "repudiates debts to save money." *Buse Timber & Sales, Inc. v. United States,* 45 Fed. Cl. 258, 263 (1999).

The possibility that plaintiffs in *Winstar*-related cases might be able to state a claim for the Government's taking of a contractual remedy has been contemplated by a previous decision in this Court. In *Castle v. United States,* 48 Fed. Cl. 187, 217-220 (2000), a *Winstar*-related plaintiff claimed that the passage of FIRREA effected a taking of its ownership interest in a failed thrift as well as its contractual agreement with the Government. The Court ruled that the passage of FIRREA itself, which deprived the plaintiff of certain accounting treatment, gave rise only to contractual based remedies. However, the Court noted that, in certain circumstances "the Takings Clause would be implicated . . . if the Government had taken away the range of remedies associated with the vindication of a contract." *Id.* at 219.

To be sure, the mere fact that no recovery is yielded by a claimant or that a claimant's contractual claim is extinguished is not in of itself a basis for a taking claim. "The lack of a 'complete' contract remedy . . . because the contract theory does not yield a recovery, [does] not give life to a takings theory." *Home Sav. of America, F.S.B. v. United States,* 51 Fed. Cl. 487, 496 (2002). Nevertheless, there is a distinct possibility that the much-noted conflict of interest vested by Congress in the FDIC – as creditor, deposit insurer, breaching party, and holder of the claims of the breached party – could, in certain *Winstar*-related cases involving failed thrifts, result in the taking of a private plaintiff's range of contractual remedies against the Government. Although this Court may, in the future, be called upon to directly addresses [sic] this issue, it is unnecessary to do so in the case at bar because the contingent nature of the Shareholder Plaintiffs' property interest precludes the finding of any taking.

The starting point for determining whether a taking has occurred is to analyze the nature of the property interest. *Branch v. United States,* 69 F.3d 1571, 1575 (Fed. Cir. 1995); *M & J Coal v. United States,* 47 F.3d 1148, 1154 (Fed. Cir. 1995). The Shareholder Plaintiffs claim that their property interest is the corporation of Security Savings and that Mississippi state law grants them an interest in Security Savings. However, this contention flies in the face of Mississippi state court precedent which holds that "the corporation is a separate entity and the shareholder does not have a legal interest in its property." *Bruno v. Southeastern Servs., Inc.,* 385 So.2d 620, 622 (Miss.1980) (*en banc*). *See also Crocker v. Federal Deposit Ins. Corp.,* 826 F.2d 347, 349 (5th Cir. 1987) ("Mississippi courts have also recognized that injury to shareholders in

the form of a diminution in the value of stock is a loss that is recoverable only by the corporation in a direct action or by the shareholders in a derivative action.") The Mississippi state law of corporations is, in this respect, consonant with this Circuit's precedent which has held, in the context of a contractual claims, that shareholders cannot recover for damages suffered by the corporation. *First Hartford Corp. Pension Plan & Trust v. United States,* 194 F.3d 1279, 1289 (Fed. Cir. 1999). *See also Cain v. United States,* 53 Fed. Cl. 658, No. 95-499C, slip op. at 9-11 (Fed. Cl. July 16, 2002); *FDIC II,* 51 Fed. Cl. at 274-75; 11 *Fletcher Cyclopedia of the Law of Private Corporations* § 5096 at 73 ("The property of a corporation does not belong, in law, to the shareholders, but to the corporation as a distinct legal entity or artificial person."). Instead, the Shareholder Plaintiffs only own shares of the corporation which "are universally considered personal property." *Fayard v. Fayard,* 293 So.2d 421, 423 (Miss.1974). Consequently, the Shareholder Plaintiffs property interest in a takings claim cannot be its interest in Security Savings as a corporate entity.

That leaves the Shareholder Plaintiffs with possession of the property interest that gave them standing to litigate this case, namely their interest "in the surplus of potential recoveries." *FDIC I,* 47 Fed. Cl. at 6 (quoting *Plaintiffs in All Winstar-Related Cases at the Court v. United States,* 44 Fed. Cl. 3, 10 (1999)). However, this interest was zeroed out because this Court ruled that the receivership deficit – an essential element of any theory of damages that could possibly result in a surplus of recoveries – was never a proper portion of Security's damages. *FDIC II,* 51 Fed. Cl. at 270. Even if the FDIC were not saddled with the conflicting roles imposed on it by Congress as described above,

it still could never have recovered for the receivership deficit. Without the receivership deficit, the maximum amount of expectancy damages that could be recovered would be $64 million. *Id.* at 272. Because shareholders of a failed thrift under the longstanding statutory priority scheme are always the last of all claimants to be paid, it would be impossible for the Shareholder Plaintiffs to obtain any surplus recoveries in the face of over $75 million in superior claims against the Security receivership. Thus, in this specific instance, while the remedy did not produce any recovery for the Shareholder Plaintiffs, they were never deprived of their property interest in a contractual remedy. As a result, Defendant did not take any property interest of the Shareholder Plaintiffs.

VI. Conclusion

Defendant's cross-motion for summary judgment as to takings claims is GRANTED. Shareholder Plaintiffs' motion for partial summary judgment as to its taking claim is DENIED. The Clerk of the Court is directed to enter judgment in favor of the Defendant in Case Nos. 92-577C and 92-817C and to dismiss the complaints of all Plaintiffs. No costs.

EDWARD J. DAMICH

Chief Judge

FEDERAL DEPOSIT INSURANCE CORPORATION, as Successor in Interest to SECURITY SAVINGS, BAILEY MORTGAGE COMPANY, SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION; and H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.

Nos. 92-577 C & 92-817 (consolidated)

UNITED STATES COURT OF FEDERAL CLAIMS

53 Fed. Cl. 31

April 12, 2002, Filed

COUNSEL: Richard M. Schwartz, Washington, DC, counsel of record for Plaintiff. John M. Dorsey, Dorothy A. Doherty, and Richard Gill, of counsel.

Mary C. Gill, Atlanta, GA, counsel of record for Shareholder Plaintiffs. Alan W. Perry, Jackson, MS, of counsel.

William F. Ryan, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, counsel of record for Defendant, with whom were Jeanne E. Davidson, Assistant Director, David M. Cohen, Director; and Stuart E. Schiffer, Deputy Assistant Attorney General. James L. Anderson, Gregory R. Firehock, Daniel D. McClain, Thomas P. Reilly, Patricia A. Smith, of counsel.

JUDGES: EDWARD J. DAMICH, Judge.

OPINION BY: EDWARD J. DAMICH

OPINION: **DAMICH**, Judge.

This case is before the Court on Plaintiff Federal Deposit Insurance Corporation's ("FDIC") motion for partial summary judgment as to takings claims, Defendant's cross-motion for summary judgment as to all

Plaintiffs' takings claims, and Plaintiff FDIC's due process claim.

This is a long-standing *Winstar*-related case. Plaintiff FDIC, as successor-in-interest to Security Savings & Loan Association of Jackson, Mississippi ("Security Savings"), seeks compensation for the elimination of Defendant's contractual promises by the Federal Savings and Loan Insurance Corporation ("FSLIC") to Security Savings that permitted it to count supervisory goodwill and other items including FSLIC cash contributions and income capital certificates towards its regulatory capital requirements. These contractual obligations were eliminated by the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183, and its implementing regulations. Plaintiff FDIC alleges that the elimination of these contractual obligations resulted in a taking of a property right and it is therefore entitled to just compensation pursuant to the Fifth Amendment of the U.S. Constitution. These contracts are discussed in further detail in the Court's opinion in *F.D.I.C v. United States,* 47 Fed. Cl. 2, 4-5 (2000).

On December 21, 2001, the Court issued an opinion which held, following the Federal Circuit's decisions in *Landmark Land Company v. United States,* 256 F.3d 1365 (Fed. Cir. 2001) and *Glass v. United States,* 258 F.3d 1349 (Fed. Cir. 2001), that Plaintiff FDIC did not possess standing under Article III of the United States Constitution because its contract claims did not present a "Case" or "Controversy." *F.D.I.C. v. United States,* 51 Fed. Cl. 265, 272 (2001). The basis for this holding was that Plaintiff FDIC, as manager of the FSLIC Resolution Fund ("FRF"), through a series of transactions and by operation of statute, serves as both payer of any judgment in this case

and creditor of Security. Because any damages that Plaintiff FDIC might receive would only be used by the FRF to pay the subrogated claim of the FRF and no one else, no adverse relationship existed between it and any third party. *See id.* at 266-69 (describing the chain of ownership of the goodwill claims, the components of the subrogated claim of the FRF, and the distribution scheme of damages.)

Additionally, in that decision, the Court also held that Plaintiff FDIC's claim for the "receivership deficit" of Security, i.e., the shortfall that occurred after the Resolution Trust Corporation made deposit insurance payments for the benefit of the former depositors of Security, presented a non-justiciable intra-governmental dispute because it was a claim of the Government and not a claim of the Thrift. *Id.* at 269-70.

Finally, the Court also held that Plaintiff FDIC could not establish a case or controversy for its contract claims by means of a controversy between it and other Plaintiffs in this case. *Id.* at 276-77.

Plaintiff FDIC is entitled to raise its disagreement with the above-enumerated holdings of the Court, if for no other reason than it will not be precluded from making similar arguments on appeal. Nevertheless, Plaintiff FDIC fails to make any meaningful distinction between its standing with respect to its takings claims as opposed to its contract claims. Therefore, the holdings of this decision are equally applicable to Plaintiff FDIC's takings claims as they are to its contract claims.

Applying the holdings described above to Plaintiff FDIC's takings claims, it is clear that Plaintiff FDIC does not have standing to pursue them in this Court. Excluding the receivership deficit to which it is not entitled, Plaintiff

FDIC at most can recover $19.6 million including interest. Pl. FDIC's Mot. at 26. If the 1-year constant maturity Treasury yield for the years 1990 through 1991 were applied to the $19.6 million figure and the interest were compounded, the amount of compensation would total approximately $36.4 million. Def.'s Mot. at App. 122. This amount is far less than the subrogated claim of the FRF, which totals in excess of $66 million. *F.D.I.C.*, 51 Fed. Cl. at 268. Because any damages awarded to Plaintiff FDIC would exceed the subrogated claim of the FRF, no case or controversy exists between Plaintiff FDIC and Defendant. Accordingly, Plaintiff FDIC lacks Article III standing to pursue this case.

Because Plaintiff FDIC does not contest dismissal of its due process claim and also because it lacks standing to pursue its takings claims, Defendant's cross-motion for summary judgment, with respect to the takings claim and the due process claim of Plaintiff FDIC, is GRANTED and Plaintiff FDIC's motion for partial summary judgment as to its takings claims is DENIED. Plaintiff FDIC is hereby dismissed from the consolidated proceedings. Final judgment shall not be entered until the remainder of Defendant's cross-motion for summary judgment and the Shareholder Plaintiffs' motion for partial summary judgment as to takings are resolved.

EDWARD J. DAMICH

Judge

FEDERAL DEPOSIT ISURANCE CORPORATION, as Successor in Interest to SECURITY SAVINGS, BAILEY MORTGAGE COMPANY, SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION; and H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.

Nos. 92-577 C & 92-817 C (consolidated)

UNITED STATES COURT OF FEDERAL CLAIMS

51 Fed. Cl. 265

December 21, 2001, Filed

COUNSEL: Richard M. Schwartz, Washington, DC, counsel of record for Plaintiff. John M. Dorsey, Dorothy A. Doherty, and Richard Gill, of counsel.

Mary C. Gill, Atlanta, GA, counsel of record for Shareholder Plaintiffs. Alan W. Perry, Jackson, MS, of counsel.

William F. Ryan, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, counsel of record for Defendant, with whom were Jeanne E. Davidson, Assistant Director; David M. Cohen, Director; and Stuart F. Schiffer, Deputy Assistant Attorney General. James L. Anderson, Gregory R. Firehock, Daniel D. McClain, Thomas P. Reilly, Patricia A. Smith, of counsel.

JUDGES: EDWARD J. DAMICH, Judge.

OINION BY: EDWARD J. DAMICH

OPINION: DAMICH, Judge.

Presently before the Court are the Defendant's motion for summary judgment as to damages, the Shareholder Plaintiffs' motion for bifurcation, and briefings on the standing of the FDIC to pursue its damages claims as

directed by the Court's Order to Show Cause. For the reasons enumerated below, the Defendant's motion for summary judgment is GRANTED in part, and the Plaintiff's motion for bifurcation is DENIED. All goodwill claims that were not disposed of in the Defendant's motion for summary judgment are dismissed due to the absence of a case or controversy between the Federal Deposit Insurance Corporation ("FDIC") and the United States. Consequently, the Shareholder Plaintiffs' contingent goodwill claims are extinguished.

I. Background

This is a long-standing *Winstar*-related case. The Plaintiffs are the FDIC, as successor-in-interest to the failed Security Savings and Loan Association of Jackson, Mississippi ("Security Savings") and, appearing separately, the shareholders of Security Savings ("Shareholder Plaintiffs").[1] The Plaintiffs seek damages for losses incurred by Security Savings when the Federal Savings and Loan Insurance Corporation ("FSLIC") breached contracts that permitted Security Savings to count supervisory goodwill and certain other items, including FSLIC cash contributions and income capital certificates ("ICC's"), in computing its regulatory capital requirements ("goodwill claims"). These contractual commitments were breached by the passage of the Financial Institutions Reform, Recovery,

[1] The Shareholder Plaintiffs, who collectively own all of the outstanding stock of Security, are H.C. Bailey, Jr.; Joan B. Bailey; Harperville Irrevocable Trust; Carol Bailey; Malco Irrevocable Trust; John T. Cossar; Glynn Hughes; Lewis S. Tilghman; Kenneth W. Warren; and Madison Hills Farm, Inc.

and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, and its implementing regulations. These contracts are discussed in further detail in the Court's opinion in *FDIC v. United States,* 47 Fed. Cl. 2, 4-5 (2000). Although Security Savings itself originally pursued its claims in what is now the U.S. Court of Federal Claims, the Resolution Trust Corporation ("RTC"), in its capacity as receiver for Security Savings, was substituted as Plaintiff for Security Savings after Security Savings was seized by the Office of Thrift Supervision ("OTS") and the RTC was appointed as Security Savings' conservator.[2] The resulting transfer of the ownership of the goodwill claims and takings claims from Security Savings to the FDIC is described in detail in the next section. The Shareholder Plaintiffs possess their own takings claim independent of the takings claim of Security Savings.

II. Ownership of Security Savings' Goodwill Claims

The FDIC, as manager of the FSLIC Resolution Fund ("FRF"), came into control of the ownership of Security Savings' goodwill claims through a complicated series of transactions. These transactions have some bearing on the issue of whether the FDIC can recover for the "receivership deficit" of Security Savings and, ultimately, whether a case or controversy exists between the United States and the FDIC. Therefore, these transactions will be discussed

[2] Subsequent to the substitution of the RTC as Plaintiff, the Shareholder Plaintiffs filed *H.C. Bailey v. United States,* 47 Fed. Cl. 2, which consisted of the same allegations as the original *Security Savings* action. These two cases were consolidated under Case No. 577C in 1997.

in some detail. First, OTS seized the assets of Security Savings on October 16, 1992, and appointed the RTC as receiver for Security Savings in what is known as a "pass-through receivership." Def.'s Resp. to the Court's Order To Show Cause (*hereinafter* "Def.'s Br.") at App. 111-14. As receiver, the RTC succeeded to all of Security Savings assets, including any goodwill claim that Security possessed. 12 U.S.C. §§ 1441a(b)(4)(A), 1821(d)(2)(A)(i) (1994). Simultaneously, the OTS issued a charter for a new institution called Security Federal Savings and Loan Association ("Security Federal"), for which the RTC was appointed as conservator. Def.'s Br. at App. 111-14. All of the assets and most of the liabilities of Security Savings were transferred from the Security Savings receivership, operated by the RTC, to Security Federal by means of a purchase and assumption agreement. Def.'s Br. at App. 115-44. In consideration for this transaction, Security Federal promised to pay the Security Savings pass-through receivership any funds that remained after all of Security Federal's liabilities were paid. Def.'s Br. at App. 125-26. As a result, the shareholders of the old Security Savings, now the Shareholder Plaintiffs in this action, possessed a contingent interest in funds contained in the Security Savings pass-through receivership.

The RTC operated Security Federal in conservatorship until April 15, 1994, when a series of events took place simultaneously that, in effect, ended the operation of Security Federal. First, OTS appointed the RTC as receiver for Security Federal. Def.'s Br. at App. 23-25. As receiver, the RTC succeeded to all of the assets of Security Federal, including the goodwill claims. 12 U.S.C. §§ 1441a(b)(4)(A), 1821(d)(2)(A)(i). Second, the RTC sold certain assets of Security Federal, including the goodwill

claims, to the RTC acting in its corporate capacity. Def.'s Br. at App. 24-30, 153-54. In the contract of sale, RTC-Corporate promised that, if it realized any money on the assets it purchased, including the goodwill claims, it would first pay the expenses that it incurred in liquidating the assets, plus interest. Def.'s Br. at App. 154 (Contract of Sale § 2.3). Any excess monies would be refunded to the Security Federal receivership for distribution in accordance with the statutory priority scheme set forth in 12 U.S.C. § 1821(d)(11). Def.'s Br. at App. 150-54 (Contract of sale §§ 1.1, 2.3).

At the same time, the RTC, as receiver for Security Federal, sold certain assets of Security Federal, as well as all of Security Federal's deposit liabilities, to several financial institutions. Def.'s Br. at App. 145. Because the assets that were sold to them were worth less than the deposit liabilities assumed by the acquiring financial institutions, RTC-Corporate provided them with approximately $84.3 million in additional funds. Def.'s Br. at App. 146. That amount represents RTC-Corporate's original subrogated claim against the Security Federal receivership. Due to continued liquidation of assets of Security Federal, the subrogated claim was reduced over time. That subrogated claim was reduced to $42.6 million but with interest stands in excess of $64.1 million as of year-end 2000. Def.'s Br. at App. 163. However, this receivership deficit now grows over time as it accrues interest. As of October 31, 2001, the subrogated claim of the FRF is now in the amount of $66,389,996. Pl. FDIC's December 11, 2001 Status Report at 2.

The RTC was terminated by operation of law on December 31, 1995, and all assets and liabilities held by RTC-Corporate, including the goodwill claim and the

RTC's subrogated claim against the Security Federal receivership, were transferred to the FRF. 12 U.S.C. § 1441a(m)(1)-(2). This portion of the FRF is known as FRF-RTC. The FRF-RTC is managed by the FDIC acting in its corporate capacity. 12 U.S.C. §§ 1811, 1821a(a)(1). Separately, the FDIC, acting in its capacity as receiver, succeeded to the RTC, acting in its capacity as receiver. 12 U.S.C. § 1441a(m)(1).

III. Distribution Scheme of Damages

Assuming that this Court were to award damages in this case, the FDIC, as manager of the FRF-RTC, would, following the chain of transactions outlined in the previous section, distribute recovery in the following order. First, pursuant to the contract of sale by which the RTC acquired Security Savings' goodwill claim, the FDIC would pay the FRF-RTC the expenses it incurred in pursuing the goodwill claim, any advances the FRF-RTC made to Security Federal, and interest on both. Second, the FDIC would then use any excess monies to satisfy FRF-RTC's subrogated claim against the Security Federal receivership. 12 U.S.C. § 1821(d)(11) ("Any deposit liability of the institution" [has priority over] "any other general or senior liability of the institution.") *See also Glass v. United States,* 258 F.3d 1349, 1355-56 (Fed. Cir. 2001), *as amended on reh'g, Glass v. United States,* 273 F.3d 1072 (Fed. Cir. 2001) ("While any net recovery by the FDIC would be distributed to creditors under the statutory scheme applicable to the . . . receivership, in this case, FRF-RTC has priority over all of the creditors under this statutory scheme."); *Landmark Land Company v. United States,* 256 F.3d 1365, 1381 (Fed. Cir. 2001). Third, if any funds remained, it would distribute the funds to other

outstanding creditors of the Security Federal receivership, pursuant to the statutory scheme in 12 U.S.C. § 1821(d)(11). Fourth, if any funds remained after all outstanding creditors of the Security Federal receivership have been satisfied, those funds would be distributed to any remaining creditors of Security Savings through the pass-through receivership of Security Savings. As shareholders of Security Savings, the Shareholder Plaintiffs would be the last creditors to be paid by the pass-through receivership of Security Savings. 12 U.S.C. § 1821(d)(11)(A)(v).

IV. The FRF as Payer of Judgments and as Creditor

The FRF, of which the FDIC is the manager, serves as both creditor of Security Federal and payer of any judgment in this case. The dual roles of the FRF are significant as to whether the FDIC can recover for the FRF's subrogated claim and the receivership deficit of Security. The FSLIC, as stated above, was the party that breached the contractual obligations at issue in this case. However, with the enactment of FIRREA, the FSLIC was abolished, and all of its assets and liabilities were transferred to its successor, the FRF. 12 U.S.C. § 1821a(a)(1), (a)(2)(A). The assets and liabilities of the former FSLIC are accounted for in a fund within the FRF separate from FRF-RTC. This separate fund is called FRF-FSLIC. Thus, FRF-FSLIC would pay the judgment of any recovery that the Court might grant in this case because it is the successor of the breaching party. *Landmark,* 256 F.3d at 1381; *Glass,* 258 F.3d at 1355. At the same time, FRF-RTC is the largest creditor of the Security receivership, with a subrogated claim of approximately $66.4 million. The only creditors with plausible claims against the Security Federal receivership are third-party creditors. Def.'s Br. at 163. Because

there are no uninsured depositor claims against the Security Federal receivership, in effect, FRF-RTC has priority, in this case, over all other creditors under the current national depositor preference statute.[3]

Finally, if the FRF is unable to recover on any deficit, the Secretary of the Treasury is required to provide the FRF with sufficient funds to satisfy any liabilities. 12 U.S.C. § 1821a(c)(1). Upon dissolution of the FRF, any remaining surplus of funds shall be paid into the Treasury. 12 U.S.C. § 1821a(f).

V. Standard for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); *Jay v. Secretary, DHHS,* 998 F.2d 979 (Fed. Cir. 1993). The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). The court must resolve any doubts about factual issues in favor of the non-moving party, *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.,* 145 F.3d 1303, 1307 (Fed. Cir. 1998), and draw all reasonable inferences in its favor. *See*

[3] The current national depositor preference statute that Congress enacted in 1993 in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 3001(c), 107 Stat. 312, 337 (August 10, 1993) (codified at 12 U.S.C. § 1821(d)), applies to the Security Federal receivership because it was instituted on April 15, 1994.

Gasser Chair Co. v. Infanti Chair Mfg. Corp., 60 F.3d 770, 773 (Fed. Cir. 1995)

VI. The FDIC Cannot Recover Under Any Of Its Theories Of Damages.

The FDIC has presented five theories of recovery in this case. First, the FDIC seeks expectancy damages in the amount of $208.6 million, which it believes to represent the "lost value" of Security Savings as of year-end 1998. Def.'s Br. at App. 78-79, 92-94, 97-99. This amount is equal to the difference between the receivership deficit of Security Federal as of year-end 1998 ($68.2 million) and the market value of the assets of Security Savings that, but for the breach, the FDIC maintains that Security Savings would have had as a result of its de-banking strategy as of year-end 1998 ($140.4 million).[4] Second, in the alternative to year-end 1998, the FDIC seeks expectancy damages in the amount of $64.0 million, representing what it argues is the "lost value" of Security Savings as of year-end 1994. Def.'s Br. at App. 78-80, 92-96, 100-02. This amount represents the market value of what the FDIC maintains that, but for the breach, Security Savings would have had as of year-end 1994 pursuant to its de-banking strategy

[4] The de-banking strategy refers to the Plaintiffs' postulation that, but for the breach, Security Savings would have exited the thrift business in 1994 and pursued other commercial interests. *See generally infra*, § VI(A)(2) on the de-banking strategy. The FDIC seeks expectancy damages for the lost value of Security calculated up until the time of the satisfaction of the judgment. However, because the expert report in this case was submitted to the Government on February 9, 1999, the expectancy damages sought have only been calculated up until year-end 1998.

($15.0 million) and the deficit of the Security receivership at year-end 1994 ($49.1 million). Year-end 1994 represents the date that, according to the FDIC's theory, Security Savings would have exited the thrift business in the absence of the breach. Third, in the alternative, the FDIC seeks a restitution claim in the amount of $5.5 million for the asserted value that Security Savings contributed to the transactions at issue in this case. Def.'s Br. at App. 77-78, 90-92. Fourth, in the alternative, the FDIC seeks $7.2 million for the cost of replacing Security Savings' goodwill at the time of the transactions at issue here. Def.'s Br. at App. 75-76, 83-90. The fifth and final theory of recovery for the FDIC is for the cost of replacing Security Savings' goodwill at the time of the breach, in the amount of $5.4 million. Def.'s Br. at App. 76, 83-90.

A. The FDIC's "Lost-value" Claim as of Year-end 1998

The FDIC's "lost-value" claim as of year-end 1998 consists of the difference between the receivership deficit of Security Federal as of year-end 1998 ($68.2 million) and the proposed value that Security Savings would have had at year-end 1998 ($140.4 million). This value is predicated on a theory, called the de-banking strategy, that, in the absence of the breach, Security Savings would have exited the thrift business by 1994 and pursued other commercial interests. The total damages claim is $208.6 million.

1. The FDIC Cannot Recover for the Receivership Deficit of Security Federal.

The receivership deficit consists of the shortfall that occurred after Security Federal's assets were liquidated

and after the RTC made deposit insurance payments for the benefit of the former depositors of Security Federal. The deficit also includes interest and tax liability. However, the largest component of the receivership deficit is the subrogated claim of the FRF-RTC in the amount of $42.6 million plus interest, for a total of $64.1 million as of year-end 2000. As of October 31, 2001, the total subrogated claim is in excess of $66 million. The FDIC argues that the receivership deficit is a component of a "unitary" expectancy damages claim of Security comprising of (a) the cost of the receivership deficit that would have been avoided had the contractual obligations of the Government not been breached and (b) the amount that Security Savings would have earned until 1994 (and beyond) when Security Savings would supposedly have "de-banked." *See generally infra,* § VI(A)(2) regarding the de-banking claim. However, the Defendant argues, convincingly, that the FDIC cannot recover for the receivership deficit of Security Federal because the receivership deficit is not a claim of Security Federal as such, but is instead a claim of the Government (the FDIC), and also because the dispute over the receivership deficit is a non-justiciable intra-governmental controversy.

First, the FDIC cannot pursue the receivership deficit claim in this case because the Federal Circuit in *Landmark* and *Glass* clearly stated that the subrogated claim of the FRF is a "claim of the Government." *Landmark,* 256 F.3d at 1381; *see also Glass,* 258 F.3d at 1355. The holding of the Federal Circuit is directly applicable to this case because the subrogated claim of the FRF cannot be, properly speaking, a claim of Security Federal, but remains, as it was prior to its liquidation, an obligation of Security Federal to its depositors, which it now owes to the

FRF as subrogee. *See Castle v. United States,* 48 Fed. Cl. 187, 198 (2000); *Hansen Bancorp. Inc.,* 49 Fed. Cl. 168, 176 n.12. This subrogated claim represents the loss absorbed, not by Security Federal, but by the RTC when it paid off the depositors of Security Federal. The receivership deficit claim, therefore, was never owned by Security Federal, but only owned by the RTC as subrogee and now transferred to the FRF as the successor to the RTC. Furthermore, the subrogated claim represents liabilities of Security Federal that cannot now, through a breach of contract claim, be converted into an asset of Security Federal. The FDIC, as successor-in-interest to Security Federal, can only recover damages suffered by Security Federal and not damages suffered by the deposit insurer such as the receivership deficit. *See Statesman Sav. Holding Corp. v. United States,* 41 Fed. Cl. 1, 12 (1998) ("Because any damage suffered as a result of the receivership deficit has been suffered by the FRF, not [the thrift], this element of plaintiff FDIC's claim must be dismissed.")

A second reason why the FDIC cannot pursue the receivership deficit claim follows from the FRF's position as both payer of judgments and as creditor in this action. Any judgment in this case, including the receivership deficit – if such sums were to be recovered – would be paid by FRF-FSLIC into the FRF-RTC fund. The result would be a transfer of funds from one portion of the FRF's accounting ledger to another. Because the FDIC, a government agency, is paying itself, the receivership deficit claim is a non-justiciable intra-governmental controversy. Moreover, the Treasury is required by statute to satisfy any unfunded liability of the FRF and is likewise the recipient of any surplus from the FRF upon its dissolution.

See 12 U.S.C. §§ 1821a(c), 1821a(f). As articulated in *Statesman:*

> If the receivership deficit claim were allowed, the result would be a federal agency, FDIC-corporate, litigating against the United States Department of Justice with the goal of causing a large portion of any damages recovered to be transferred from one Treasury account to another. Such a result would be nonsensical in that the United States Treasury has already provided the FRF with the funds used to make depositors of failed thrifts whole, is required to fund any FRF deficit, and will be the beneficiary of any FRF surplus.

Statesman, 41 Fed. Cl. at 13.

Therefore, there is no possibility that the failure of the FDIC to recover the receivership deficit would result in an increase of the liability of the government. Accordingly, because the receivership deficit claim is, ultimately, a non-justiciable intra-governmental dispute, the FDIC cannot recover damages for it. *See also Castle,* 48 Fed. Cl. at 199.

2. The FDIC Cannot Recover Expectancy Damages Under a De-Banking Strategy After 1994.

The FDIC seeks a lost-profits theory of expectancy damages predicated upon what it calls a "de-banking" plan as described by the Shareholder Plaintiffs' experts, Nevins Baxter and Paul Salvo. The FDIC claims that, even if the Government had not breached its contractual obligations to Security Savings, the non-breach provisions of FIRREA would have prevented Security Savings from simultaneously participating in the thrift business and engaging in direct investment in real estate and other equity investments such

as financial institutions. Faced with a choice between these two lines of business, Security Savings would have chosen to continue managing its real estate and other equity holdings and to exit the thrift business by means of a "de-banking" strategy. The de-banking strategy would have consisted of several steps. First, Security Savings would have sold its mortgage banking and servicing operation in 1990. Def.'s Br. at App. 54-55. It would have re-purchased ICC's held by the FRF. Def.'s Br. at App. 61. It would have then relinquished its thrift charter and sold its retail banking franchise (including its deposits and branch offices) in 1994. Def.'s Br. at App. 55-57. It would have then held on to its remaining assets and changed the name of the corporation to the hypothetically named "SS Inc." SS Inc. would then serve as an investment holding company for direct investments in financial institutions and real estate that would appreciate over time. SS Inc. would also have collected or disposed of remaining commercial loans and retained foreclosed real estate properties. Def.'s Br. at App. 57-64. The expectancy damages sought by the FDIC would include the net proceeds raised from the de-banking strategy described above and the wounded-bank damages[5] avoided by Security Savings, all of which Security Savings would have accrued but for the breach. Def.'s Br. at App. 52. As of year-end 1998, the estimated amount of damages would be approximately

[5] "'Wounded bank' damages have been defined as costs resulting from a bank's 'perilous financial condition' created by a breach of contract." *Coast Federal Bank, F.S.B. v. United States,* 48 Fed. Cl. 402, 434 (2000) (citing *California Federal Bank v. United States,* 43 Fed. Cl. 445, 448 (1999), *rev'd on other grounds,* 245 F.3d 1342 (Fed. Cir. 2001)).

$140.4 million, though that amount would likely be higher if calculated today. Def.'s Br. at App. 71.

Assuming for the sake of argument that this Court were to accept the FDIC's proposed de-banking strategy, the FDIC could not possibly recover damages for any damages suffered by Security Savings beyond 1994. Under the FDIC's own strategy, the successor entity of Security Savings would not operate as a thrift after 1994. While it is certainly true that successor corporations can own goodwill claims – such as when California Federal Savings Bank acquired Glendale Federal Bank and its goodwill claims, *Glendale Federal Bank, FSB v. United States,* 239 F.3d 1374, 1378 (Fed. Cir. 2001) – SS Inc. is neither a bank nor a thrift and has no use for supervisory goodwill. Had Security Savings, but for the breach, de-banked, the benefits of the contractual obligation of the Government to count goodwill towards regulatory capital would not flow to SS Inc., but would instead flow to the purchaser of the thrift's business. The FDIC can, as the successor-in-interest and as receiver to Security Savings, possess the contractual claims of what Security Savings could have possessed but for the breach. 12 U.S.C. §§ 1441a(b)(4)(A); 1821(d)(2)(A)(i); *O'Melveny & Myers v. F.D.I.C.,* 512 U.S. 79, 86, 129 L. Ed. 2d 67, 114 S. Ct. 2048 (1994) (as receiver, the RTC and FDIC "step[ ] into the shoes" of a failed thrift). However, the FDIC possesses no greater authority than Security Savings had it survived. *Waterview Mgmt. Co. v. F.D.I.C.,* 323 U.S. App. D.C. 82, 105 F.3d 696, 701 (D.C. Cir. 1997); *Statesman,* 41 Fed. Cl. at 11. Therefore, in the non-breach world, SS Inc. could not possibly have retained the benefits of the contract. Assuming that the FDIC can recover lost profits deriving from a

de-banking strategy constructed *post hoc,* it can only do so no later than year-end 1994.[6]

B. The Remaining Damage Theories Do Not Present a Case or Controversy Between the FDIC and the Federal Government.

Article III, § 2 of the U.S. Constitution restricts federal courts from deciding any issue other than "Cases" or "Controversies." *Arizonans for Official English v. Ariz.,* 520 U.S. 43, 64, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997). Incorporated within the case or controversy requirement is the standing of a party to sue. *Id.* In order for a party to have standing, there must be a true adverse relationship between the parties. *Aetna Life Ins. v. Haworth,* 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461 (1937). In this case, the FDIC cannot establish an adverse relationship between itself and the Government because, assuming that the FDIC obtained a judgment on any of its remaining damages theories, none of the money paid by FRF-FSLIC would ever be received by anyone other than FRF-RTC. *Landmark,* 256 F.3d at 1382; *Glass,* 258 F.3d at 1355-56. As stated above, the subrogated claim of the FRF-RTC in this case against Security Federal is in excess of $66 million dollars. The subrogated claim of the FRF-RTC against Security Savings exceeds the $64 million that

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[6] The Defendant also argues that, as a matter of law, the FDIC's expectancy damage claim, and its de-banking strategy in particular, is unforeseeable and that there is a lack of causation between it and the breach. However, as will be explained in the following section, the amount sought for the expectancy damage claim as of year-end 1994 is insufficient to establish a case or controversy with respect to the FDIC's contract claims. Therefore, the Court will not address these issues.

remains from the FDIC's expectancy damage claim as of year-end 1994, excluding the receivership deficit component which is unrecoverable for the reasons stated above. The subrogated claim of the FRF-RTC far exceeds the FDIC's theories of recovery valued by a restitution theory or valued by the cost of replacement of goodwill at either the time of the transactions at issue in this case or at the time of the breach. The damages that could be recovered from these theories are $5.5 million, $7.2 million, and $5.4 million respectively. Because there are no other creditors in this case, such as uninsured depositors, that could have the same priority as the FRF, all proceeds from the judgment would be used by the FRF to pay itself.

Furthermore, as stated above, the U.S. Treasury is required by statute to fund any deficit remaining in the FRF and is the beneficiary of any surplus of the FRF at its dissolution. Because the FRF is fully funded, recovery by the FRF does not affect third-party creditors with claims against the FRF. *Landmark,* 256 F.3d at 1381. Therefore, when faced with the situation outlined in *Landmark* and *Glass* where there are no third-party creditors that could recover damages or are otherwise on a par with the FRF-RTC, the FDIC cannot recover the claims of the FRF-RTC because such claims do not present a case or controversy.[7]

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[7] Importantly, the FDIC concedes that no third-party creditor or stockholder would have any recovery in this specific case:

> Were this court to hold, in our view erroneously, that the FDIC's recovery on its lost profits/lost equity value claim as of 1994 was limited to recovery of an amount equal to the positive equity value Security Savings should have had in 1994 absent the breach, under the facts of this particular case, the evidence currently indicates that any such

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There is, however, one difference between the claims in this case and the claims in *Glass* and *Landmark,* and that is the nature of the claims of the Shareholder Plaintiffs. In *Landmark,* the FDIC was an intervening party whose claims were independent of that of the original plaintiff, Landmark, which was also permitted to remain in the case as a co-plaintiff. *Landmark,* 256 F.3d at 1382. In *Glass,* the shareholder plaintiffs were "at most incidental beneficiaries of the contract with no rights to enforce the contract against the United States." *Glass,* 258 F.3d at 1355. In the present case, the FDIC is the successor to the thrift and the Shareholder Plaintiffs intervened in this case to sue "derivatively on behalf of the shareholders, and maintain their claim . . . in the manner that Judge Turner termed it: 'a direct, vested interest in the surplus of potential recoveries.'" *F.D.I.C.,* 47 Fed. Cl. at 6. The claims at issue in *Glass* or *Landmark,* unlike the present case, did not involve derivative claims.

Notwithstanding these differences, the holding of *Glass* and *Landmark* is directly applicable to the present case. "Critical to the issue of standing, then, is the fact that adjudication of the FDIC's claim cannot affect any party other than the government." *Landmark,* 256 F.3d at 1381. If, for the sake of argument, the FDIC were to adjudicate the remaining claims, the monies paid by FRF-FSLIC would be used to partially satisfy the subrogated claim of FRF-RTC. Because there would be no monies left over, the Shareholder Plaintiffs could not receive any

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recovery would not result in recovery by any third party creditor or stockholder.

Pl FDIC's Response to Proposed Stipulation 4.

recovery insofar as they only have an interest in the "surplus of potential recoveries." *F.D.I.C.*, 47 Fed. Cl. at 6. The Shareholder Plaintiffs are, therefore, no worse off if the FDIC's contract claims are dismissed than they would be if the FDIC adjudicated its claims: in both cases the amount of surplus recovery is zero. Logically, therefore, the FDIC's goodwill claims should be dismissed for lack of a case or controversy. Likewise the Shareholder Plaintiffs contingent goodwill claims also should be dismissed because, as there is no possibility of any surplus recoveries that they can receive, their claims are extinguished.

VII. The Goodwill Claims Of The Shareholder Plaintiffs And The FDIC Cannot Be Bifurcated.

To prevent dismissal of all goodwill claims the Shareholder Plaintiffs have filed a motion to bifurcate the contract claims of the FDIC and the shareholders.[8] They maintain that the claims must be bifurcated because the FDIC, due to what Judge Miller aptly described as its "hydraheaded"[9] role in *Winstar*-related proceedings because it is the successor-in-interest to both the breaching party and the original plaintiff, has been effectively precluded from pursuing the contract claims of Security Savings. In particular, the Shareholder Plaintiffs maintain that the duties imposed by statute upon the FDIC present insuperable conflicts of interest. These roles include its

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[8] This motion to bifurcate was filed in response to the Defendant's motion for summary judgment based upon the FDIC's inconsistent statements which, if the Court had granted, would have dismissed the contract claims of both the FDIC and the shareholders.

[9] *Statesman*, 41 Fed. Cl. at 13 n.17.

duty as receiver of Security Savings, 12 U.S.C. § 1441a(m)(1); as owner of the claims of Security Federal as manager of FRF-RTC, 12 U.S.C. § 1441a(m)(2); and as successor to the obligations of the breaching party FSLIC in its role as manager of FRF-FSLIC, 12 U.S.C. § 1821a(a)(1). Moreover, the Shareholder Plaintiffs argue that they could be precluded by statute from challenging any amount that the FDIC will pay itself as manager of the FRF-RTC or otherwise challenging the FDIC's application of the priority scheme. 12 U.S.C. § 1821(d)(13)(D) (bars judicial review of any "claim or action for payment from" or "action seeking a determination of rights with respect to" any "asset" of a failed bank). *But see* 12 U.S.C. § 1821(d)(6) (providing administrative review "with respect to any claim against a depository institution for which [the FDIC] is receiver" in the district court where the failed bank had its principal place of business or the U.S. District Court for the District of Columbia); *Freeman v. F.D.I.C.,* 312 U.S. App. D.C. 324, 56 F.3d 1394, 1400 (D.C. Cir. 1995). They maintain that, because of the failure of the FDIC to effectively pursue the goodwill claims of Security Savings, bifurcating their derivative claim from the contract claim of the FDIC provides them with the right to recover "surplus" from Security's expectancy damage claim directly from the Government. As justification for this motion, they cite the Federal Circuit's decisions in *Branch v. United States,* 69 F.3d 1571 (Fed. Cir. 1995), and *California Housing Securities, Inc. v. United States,* 959 F.2d 955 (Fed. Cir. 1992), as well as Judge Turner's non-binding opinion in *Plaintiffs in All Winstar-Related Cases v. United States,* 44 Fed. Cl. 3 (1999) as holding that their rights as shareholders are "independent of, and equal to, those of the FDIC." Pl.'s Mot. to Bifurcate at 17.

In response to this Court's Order to Show Cause, however, the Shareholder Plaintiffs have seemingly backed away to a degree from their implied assertion that they can appropriate the goodwill claims of Security for themselves. Instead, they request the Court to stay the FDIC's goodwill claims, and permit the shareholders to litigate Security Savings' contract claim derivatively and the shareholders' own takings claim. The Shareholder Plaintiffs propose that if any damages are recovered, the FDIC could not recover the portion of the damages that belongs to it, but that the "surplus" of such damages could be recovered by the shareholders. However sympathetic the Court is to the frustrations of the Shareholder Plaintiffs that they may recover nothing as a consequence, perhaps in part, of the seemingly conflicting roles that Congress mandated the FDIC to perform even though they initiated this case and pursued their goodwill claims for many years, their unique proposal to bifurcate the claims of the plaintiffs is in itself impossible and could not, in any event, salvage the goodwill claims in this case even if their motion were to be granted.

First, a motion to bifurcate is a procedural device to promote the smooth administration of claims. *Bull HN Information Sys. Inc. v. Hutson,* 229 F.3d 321, 329 (1st Cir. 2000). The Shareholder Plaintiffs cannot show that a procedural device can create substantive rights that otherwise would not exist. The Shareholder Plaintiffs certainly cannot, through bifurcation of the goodwill claims, directly obtain a judgment in this case for themselves from the Government, under the guise of a derivative action, for damages in the place of the FDIC when the FDIC is the proper owner of the goodwill claims of Security Savings.

> The procedural device of derivative actions does not broaden the scope of the waiver of sovereign immunity. Rather, in circumstances in which those in control of the management of the corporation are unable or unwilling to bring suit, it permits shareholders to step into the shoes of the corporation and file suit as fiduciaries on the corporation's behalf and for the corporation's benefit.

First Hartford Corp. Pension Plan & Trust v. U.S., 194 F.3d 1279, 1293 (Fed. Cir. 1999). Functionally, this means that shareholders of a failed thrift cannot assert a direct claim against the United States. "One of the principal motivations behind utilizing the corporate form is often the desire to limit the risk of ownership to the amount of capital invested and thus avoid the obligations, contractual or otherwise, of the corporation. Consequently . . . shareholders may not bring breach of contract claims on their own behalf in the Court of Federal Claims." *First Hartford,* 194 F.3d at 1289.

In his opinion finding a breach of contract in this case, former Chief Judge Smith did not address the issue of whether the Shareholder Plaintiffs could recover directly from the Government or whether all damages should be channeled through the receivership. *F.D.I.C. v. United States,* 47 Fed. Cl. at 6 n.6. However, this question, along with the issue of whether the goodwill claims of Security as such may be litigated by the Shareholder Plaintiffs, has been effectively addressed by *First Hartford.* The Federal Circuit permitted shareholders to sue derivatively for a surplus in any recovery precisely because the shareholders must receive their share of any judgment through the receivership and not directly from the Government itself.

> The same principle applied in *California Housing* and *Branch* is equally applicable here. First Hartford, as a shareholder in [the bank] has a property interest in any liquidation surplus. The interest in that liquidation surplus is created by the statutory direction that, if funds remain after all depositors, creditors, and other claimants have been paid, the receiver is to distribute such funds to the depository institution's shareholders. *See* 12 U.S.C. § 1821(d)(11) (1994). This contingent interest is not materially distinct from the property interest in *California Housing* and *Branch* because in those cases, like here, a judgment favorable to the plaintiff would increase the assets of the depository institution and thus potentially enlarge any liquidation surplus to be distributed among the shareholders.

First Hartford, 194 F.3d at 1288. Moreover, if the Shareholder Plaintiffs were permitted to recover Security's goodwill damages directly against the Government either through a direct claim or derivatively through a "bifurcated" procedure outside of the receivership, the possibility of double recovery could exist if in fact damages could ever be recovered. As articulated in *Statesman:*

> To accept private plaintiffs' allegations that their claim can be considered outside the rubric of receivership law would raise the possibility of double recovery. No question exists that the corporation, and therefore the receiver, is entitled to bring a claim for [the bank's] lost profits/lost equity value, but the court can award such damages only once. No authority authorizes the court to prorate the expectancy damages based on the degree of damage suffered by each party.

Statesman, 41 Fed. Cl. at 17. Denying the Shareholder Plaintiffs the ability to pursue the goodwill claims of Security outside the statutory priority scheme, whether "derivatively," directly, or through a "bifurcation" device, is not unjust. "Although private plaintiffs may once have been the sole owners of [the bank], they are no longer. Having been displaced, private plaintiffs have no choice but to operate within the confines of the receivership priority system." *Statesman,* 41 Fed. Cl. at 18.

However, even if the Shareholder Plaintiffs were able to use bifurcation to pursue the goodwill claims of Security *for the benefit of* the FDIC, there are still several insuperable barriers to their proposal. First, while it is true that, as stated in *Suess v. United States,* 33 Fed. Cl. 89, 93 (1995), "where the government has taken over and dissolved the corporation, this need for the derivative suit is particularly apparent and perhaps even poignant," the shareholders were permitted to sue derivatively in this case, as stated above, for the limited purpose of protecting *their own interest* in any surplus recoveries. *F.D.I.C.,* 47 Fed. Cl. at 6 ("Shareholder plaintiffs have never hidden the fact that they are suing derivatively on behalf of the shareholders, and maintain their claim is 'direct' in the manner Judge Turner termed it: 'a direct, vested interest in the surplus of potential recoveries.' "). In *First Hartford,* shareholders of a failed bank were permitted to sue derivatively because it possessed "a potential liquidation surplus" in any recovery by the FDIC. *First Hartford,* 194 F.3d at 1296. Although the Shareholder Plaintiffs insist that the holdings of *Branch* and *California Housing* permit them to pursue Security's goodwill claims, in fact nothing in *Branch* or *California Housing* suggests that the scope of the shareholders' derivative status in this case is

any greater than the shareholder plaintiffs in *First Hartford. Branch,* 69 F.3d at 1574-75 ("A judgment favorable to the plaintiff in this case would increase the assets of [the bank holding company] and could result in a surplus that would benefit [the bank holding company's] shareholders."); *California Housing,* 959 F.2d at 957 n.2 ("compensation to the corporation will result in a surplus in which the shareholder possesses a direct interest. . . ."). *See also First Hartford,* 194 F.3d at 1288 ("This contingent interest is not materially distinct from the property interest in *California Housing* and *Branch* because in those cases, like here, a judgment favorable to the plaintiff would increase the assets of the depository institution and thus potentially enlarge any liquidation surplus to be distributed among the shareholders.").

Because the Shareholder Plaintiffs have only a contingent interest in surplus recoveries, even if the Court were to permit them to sue the Government derivatively on behalf of the FDIC, in this instance bifurcation cannot solve the underlying standing issue that they seek to rectify. In the end, no matter whether the shareholders would be permitted to litigate the goodwill claims of Security on behalf of either Security or only for the shareholders' interest in the "surplus," the FDIC, as manager of the FRF, is still the legal owner of Security's claims and the FRF would still be able to pay itself with any judgment obtained in this case. In every instance the remaining surplus recovery for the Shareholder Plaintiffs would be zero because no viable theory of damages that exceeds the subrogated claim of the FRF-RTC exists. Thus, any attempt by the Shareholder Plaintiffs to proceed on the goodwill claims by bifurcating their claims from that of the FDIC would be an exercise in futility.

Finally, the Shareholder Plaintiffs cannot litigate the goodwill claims of Security derivatively and stay the FDIC's non-recoverable claims because the case or controversy issue is a component of subject matter jurisdiction and cannot be waived. *Sosna v. Iowa,* 419 U.S. 393, 398, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975); *Landmark,* 256 F.3d at 1380. Standing must exist at every stage of judicial proceedings. *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477-78, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). Because there is no case or controversy between the Government and the FDIC with respect to the goodwill claims, the Court lacks subject matter jurisdiction to entertain these claims under any guise or otherwise stay the FDIC's non-justiciable claims. *Desktop Direct, Inc. v. Digital Equip. Corp.,* 993 F.2d 755, 760 (10th Cir. 1993), *aff'd,* 511 U.S. 863, 128 L. Ed. 2d 842, 114 S. Ct. 1992 (1994).

Therefore, there is no basis for the Shareholder Plaintiffs in this case to sue derivatively for anything more than their share of surplus recoveries or to otherwise pursue a direct claim against the Government through "bifurcation," because there will be no surplus recoveries. Likewise, the FDIC's goodwill claims cannot be stayed because, if it lacks standing to pursue its claims, such claims must be dismissed. The Shareholder Plaintiffs' motion to bifurcate must, therefore, be denied.[10]

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[10] The Shareholder Plaintiffs also maintain that this Court must resolve certain vague "due process" issues before dismissal of the contract claims. It is unclear to the Court exactly what due process issues are at stake in this case, but, in any event, the shareholders cannot enforce any rights to a contract with the United States in which they were not a party to the agreements that gave rise to the present

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VIII. Miscellaneous Arguments

The FDIC argues that a case or controversy can be established by means of a controversy between it and the Shareholder Plaintiffs over the means for distributing any recovery. However, this Court possesses jurisdiction only to entertain claims against the United States. 28 U.S.C. § 1491(a)(1) (1994). The claim before this Court is that the United States breached its contractual obligations to Security Savings. The shareholders have not brought an actual claim before this Court that the United States has somehow deprived them of proceeds that it was entitled to under a distribution scheme. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 577, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) ("but under Article III, Congress established courts to adjudicate cases and controversies as to claims. . . .") quoting *Stark v. Wickard,* 321 U.S. 288, 310, 88 L. Ed. 733, 64 S. Ct. 559 (1944). Nor can the FDIC remain in the case as a necessary party or as an intervener merely because the Shareholder Plaintiffs have a separate breach claim against the United States. As explained earlier, the Shareholders' goodwill claims are dependent on the resolution of the FDIC's claims, and because, in this case, there can be no surplus of recovery for the shareholders no matter whether the FDIC's claims are adjudicated or not, the FDIC cannot piggyback its non-justiciable claims onto the Shareholder Plaintiffs' non-viable claims. The FDIC's claims and

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action or are otherwise not in privity of contract with the United States. *Glass,* 258 F.3d at 1355.

the shareholders' claims, in this instance, must fall together.[11]

Finally, the FDIC argues that it must have standing to fulfill its statutory obligations to the receivership and claimants against it. *See e.g.* 12 U.S.C. § 1821(d)(2)(B) (duty to collect and administer assets), 12 U.S.C. § 1821(d)(11) (duty to distribute assets in accord with priority scheme), and 12 U.S.C. § 1819(a)(Fourth) (independent litigating authority). It cites *S.E.C. v. U.S. Realty,* 310 U.S. 434, 459-60, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940) for the proposition that it must remain in the case to pursue its statutory duties. In *U.S. Realty,* the Security and Exchange Commission ("S.E.C.") sought to intervene in a bankruptcy proceeding to insure that the proceeding took place under Chapter 10 of the Bankruptcy Code (which afforded the S.E.C. supervisory rights) rather than under Chapter 11 as sought by the debtor. The Supreme Court held that the district court properly allowed the S.E.C to intervene in the case in order to maintain its statutory authority over certain kinds of bankruptcy proceedings, even though the S.E.C. had no direct personal or pecuniary interest in the litigation.

There are, however, two key differences between this case and *U.S. Realty.* First and foremost, *U.S. Realty* did not involve a situation where a non-justiciable intra-governmental controversy presented itself. Second, had it

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[11] The FDIC argues that it has ancillary standing in this case because the FDIC's expectancy damage theory may be greater than the amount of the subrogated claim of the FRF-RTC. However, that argument is moot because there is no viable theory of recovery which would be greater than the subrogated claim of the FRF-RTC.

not prevailed, the S.E.C. would have been prevented from fulfilling its statutory duties at the outset of the proceedings. However, the FDIC was in fact permitted to intervene in the Shareholder Plaintiffs' case *Bailey v. United States,* 47 Fed. Cl. 2 and was substituted as the Plaintiff and successor-in-interest to Security Savings in the present lead case. The FDIC has litigated this case pursuant to its statutory duties for some time. Therefore, *U.S. Realty* is inapposite.

Accordingly, all remaining goodwill claims of both the FDIC and the Shareholder Plaintiffs must be dismissed.

IX. Takings

The Defendant argues that the FDIC's takings claims must likewise be dismissed. As of the date of this opinion, the FDIC has not provided the amount of damages suffered by a taking. If the FDIC cannot produce a plausible takings claim in excess of the FRF's subrogated claim, then the takings claim must likewise be dismissed. However, because the Court has already ordered briefings on the FDIC's and the Shareholder Plaintiffs' independent takings claims, the Court will not dismiss the FDIC's takings claim but will instead permit the FDIC to construct a takings theory that exceeds the subrogated claim of the FRF, if possible.

X. Conclusion

The Defendant's motion for summary judgment is GRANTED in part. The Shareholder Plaintiffs' motion for bifurcation is DENIED. All goodwill claims that were not disposed of in the Defendant's motion for summary judgment

are dismissed due to the absence of a case or controversy between the Federal Deposit Insurance Corporation ("FDIC") and the United States. Consequently, the Shareholder Plaintiffs' contingent goodwill claims are extinguished.[12]

IT IS SO ORDERED.

EDWARD J. DAMICH

Judge

[12] Because all contract claims have been dismissed, the Defendant's motion for summary judgment based upon the FDIC's inconsistent statements and all motions in limine are denied as moot.

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in Interest to SECURITY SAVINGS, BAILEY MORTGAGE COMPANY, SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION; and, H.C. BAILEY, JR., et al., Plaintiffs, v. THE UNITED STATES, Defendant.

Case Nos. 92-577C and 92-817C (consolidated under 92-577C)

UNITED STATES COURT OF FEDERAL CLAIMS

47 Fed. Cl. 2

May 8, 2000, Filed

COUNSEL: Mary C. Gill, Alston & Bird LLP, Atlanta, Georgia, with whom was Alan W. Perry, Forman, Perry, Watkins, Krutz & Tardy, PLLC, Jackson, Mississippi, for H.C. Bailey, Jr., et al., plaintiffs.

Richard M. Schwartz, with whom was John M. Dorsey III, Federal Deposit Insurance Corporation, Washington, D.C., for plaintiff Federal Deposit Insurance Corporation, plaintiff.

Robert Steinbuch, with whom were James L. Anderson, Ming-Yuen Meyer-Fong, Thomas P. Reilly, William F. Ryan, Jeanne E. Davidson, Deputy Director, David M. Cohen, Director, and David W. Ogden, Acting Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant.

JUDGES: LOREN A. SMITH, CHIEF JUDGE.

OPINION BY: LOREN A. SMITH

OPINION:

SMITH, Chief Judge.

This extensively chronicled *Winstar*-related case is before the court on defendant's motions to dismiss and the parties' cross-motions for summary judgment on breach of contract.[1] Plaintiffs in these consolidated cases are the Federal Deposit Insurance Corporation (FDIC), successor in interest to the failed Security Savings and Loan Association (Security), and the shareholders of Security (Security shareholders).[2] The plaintiffs collectively contend that Security Savings had enforceable contracts with the government with respect to the accounting and capital treatment to be afforded goodwill, cash contributions, and income capital certificates (ICC's) arising out of two merger transactions in the 1980's, and that the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, 103 Stat. 183,

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[1] During the briefing on the motions, there was some confusion as to whether defendant had or had not filed cross-motions for summary judgment as to liability. In both its responsive briefs to the plaintiffs' two motions for summary judgment as to liability, defendant indicated only that it was filing responses to the motions of the plaintiffs and its own motions to dismiss. However, it appears quite clear from the arguments set forth in the government's briefs that, in fact, the government was moving for summary judgment as to the issue of contract liability. Regardless, thanks to sur-replies allowed by the court, the parties have had the opportunity to fully brief the motions to dismiss and cross-motions for summary judgment. The court's review is further buttressed by the additional briefing ordered by the court as part of the *California Federal* show cause process, *see California Federal Bank v. United States,* 39 Fed. Cl. 753, 779 (1997), and the additional Common Issue 11 briefing on the standing of investor and shareholder plaintiffs.

[2] The shareholders, who collectively own all the outstanding stock of Security, are H.C. Bailey, Jr., W.C. Bailey, Joan B. Bailey, Harperville Irrevocable Trust, Carol A. Bailey, Malco Irrevocable Trust, John T. Cossar, Glynn Hughes, Lewis S. Tilghman, Kenneth W. Warren and Madison Hills Farm, Inc.

and its implementing regulations breached those contracts. Defendant contends that neither the FDIC nor the Security shareholders can bring a cause of action in this court and that, regardless, the government never contracted with Security regarding the regulatory treatment accorded goodwill and the assistance involved in the transactions.

After a thorough review of the parties' briefs and the relevant law, with due consideration given to the prior *Winstar*-related opinions issued by this court, the court denies the government's motions to dismiss; denies defendant's motions for summary judgment as to liability; and grants the motions of the FDIC and the Security shareholders for summary judgment as to liability for breach of contract.[3]

BACKGROUND

The saga of the Security Savings litigation is long. This case originally was initiated by Security Savings in the United States District Court for the Southern District of Mississippi, in an effort to stave off seizure by the government. After conducting an evidentiary hearing, the District Court concluded that the government "was contractually obligated to permit Security Savings to treat the ICC's and cash contribution as a capital asset," and that these obligations survived the passage of FIRREA. *See Security Sav. and Loan Ass'n v. Director, Office of Thrift*

[3] The court notes that this opinion does not address the constitutional Fifth Amendment taking claims of plaintiffs, which were not the subject of this phase of dispositive briefing.

Supervision, 761 F. Supp. 1277, 1283-85 (S.D. Miss. 1991). The District Court granted Security Savings' request for a permanent injunction against the government from enforcing the provisions of FIRREA in a manner inconsistent with the government's obligations under the agreements. *See Id.*

The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court, and held that the FIRREA intended to abrogate such agreements, and that as such a claim for compensation needed to be brought before the Court of Federal Claims. *Security Sav. and Loan Ass'n v. Director, Office of Thrift Supervision,* 960 F.2d 1318, 1323 (5th Cir. 1992).[4]

The case was subsequently transferred to the now Court of Federal Claims, and this court determined, upon motion of Security for a temporary restraining order or preliminary injunction to prevent the government from taking any action to interfere with the operations or control of Security, that it lacked the jurisdiction to grant the motion. *See Security Sav. and Loan Ass'n v. United States,* 26 Cl. Ct. 1000, 1003-04 (1992). That decision was upheld on appeal to the Court of Appeals for the Federal Circuit. *Security Sav. and Loan Ass'n v. United States,* 983 F.2d 1085 (Fed. Cir. 1992). Shortly thereafter, the Office of Thrift Supervision (OTS) seized Security Savings and appointed the Resolution Trust Corporation (RTC) as

[4] In the opinion, the Fifth Circuit referred only to a Fifth Amendment just compensation claim, but the same logic, of course, obtains for a suit founded upon breach of contract.

conservator.[5] The court then permitted the RTC to substitute as the real party in interest for Security Savings, and the shareholder plaintiffs filed *H.C. Bailey v. United States,* 47 Fed. Cl. 2, 2000 U.S. Claims LEXIS 109, and moved to intervene in *Security Savings.* By order dated February 25, 1998, the cases were consolidated for all purposes under Case No. 92-577C and have since proceeded in tandem in preparation for trial.

Two transactions are at the center of this case. The first is the 1984 assisted acquisition of New North Mississippi Federal Savings and Loan Association ("New North") by Security Savings and Loan Association. New North was a federally chartered savings and loan that had been formed to assume the assets and liabilities of a failing state chartered institution, North Mississippi Savings & Loan Association. The second transaction is the 1985 assisted acquisition of Security Trust Federal Savings and Loan Association of Oak Ridge Tennessee, by Bailey Mortgage Company, a wholly-owned subsidiary of Security Savings.

Plaintiffs contend that, in both transactions, the government contractually guaranteed that the cash

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[5] This case has proceeded under procedures developed after the Supreme Court's decision in *United States v. Winstar,* 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). The court has discussed the procedures designed to resolve the fundamental issues of contract breach and standing in other opinions. *See, e.g., Bluebonnet Sav. Bank v. United States,* 43 Fed. Cl. 69, 71 (1999). For more discussion on the crisis in the thrift industry, and the response by regulators to this crisis, see generally the discussion in the Supreme Court's *Winstar* decision. *United States v. Winstar,* 518 U.S. 839, 116 S. Ct. 2432, 2440-47, 135 L. Ed. 2d 964 (1996).

contributions of the FSLIC and the income capital certificates purchased by the FSLIC could be used to meet regulatory net worth requirements, and that Security could continue to rely on the inclusion of the cash contributions in its net worth account indefinitely. Further, plaintiffs contend that the government guaranteed that Security could use the supervisory goodwill created from both transactions as an amortizing asset for regulatory purposes.

The government challenges several fundamental premises of the claims brought by plaintiffs as well as their right to bring these claims at all. Preliminarily, defendant argues that neither the Security shareholders nor the FDIC can bring suit on behalf of Security, and that hence their claims should be dismissed pursuant to RCFC 12(b)(4) for failure to state a claim upon which relief can be granted. Even were the FDIC and the Security shareholders somehow able to bring suit on behalf of Security, however, defendant contends the government did not contract with Security to guarantee the treatment of supervisory goodwill, and that, as far as the regulatory treatment of the cash contributions and ICC's, Security expressly agreed to language in the transactions shifting the risk of any regulatory change onto Security. The court will thus review the motions to dismiss, and then the parties' contentions about what Security and defendant contractually agreed to in the New North and Security Trust transactions.

MOTIONS TO DISMISS

The government has filed motions to dismiss against both the FDIC and the Security shareholders. However, in

light of prior rulings of the court the motions must be denied. Briefly, defendant has filed two motions to dismiss against the Security shareholders: the first, filed in 1993 and subsequently renewed by the government after the stay was lifted in this case, contends that the Security shareholders cannot bring this action in a derivative capacity because, even if the court can entertain derivative suits, *see Suess v. United States,* 33 Fed. Cl. 89 (1995), it is axiomatic that shareholders cannot bring a derivative suit if the corporation – in this case, the FDIC as successor to Security – is bringing suit on behalf of the corporation. However, Issue Judge James T. Turner essentially disposed of that argument, citing *California Housing Sec., Inc. v. United States,* 959 F.2d 955 (Fed. Cir. 1992) and *Branch v. United States,* 69 F.3d 1571 (Fed. Cir. 1995), in permitting plaintiffs suing derivatively to file amended complaints alleging a cause of action to protect the shareholder interest in the surplus.

Sensing that this line of attack was forestalled by Judge Turner's ruling, defendant contends, in its second motion to dismiss directed against Security's shareholders, that the Security shareholders failed to file an amended complaint that complied with Judge Turner's guidelines for such amended complaints, and that the Security shareholders continue to assert a "direct" claim on behalf of the failed thrift, which they cannot do. Judge Turner's written opinion, which was issued after these motions were briefed, would seem to dispose of both of the motions to dismiss directed against Security's shareholders. Judge Turner, again relying on *California Housing* and *Branch,* concluded:

> Shareholder plaintiffs suing derivatively in the cases affected by FDIC's motion . . . have a direct,

> vested interest in the surplus of potential recoveries and, therefore, have standing to remain as plaintiffs in these actions notwithstanding FDIC's appearance on behalf of the failed thrifts.

Plaintiffs in All Winstar-Related Cases at the Court v. United States, 44 Fed. Cl. 3, 10 (1999). The government's motion to dismiss on the ground that plaintiff cannot bring a claim when the corporation has brought the claim is thus resolved against the government. The second motion, based on the government's contention that shareholder plaintiffs did not file a complaint that was premised on a "surplus" theory – that in effect shareholder plaintiffs are really trying to bring the claim of the thrift itself – is an unpersuasive semantic argument. Shareholder plaintiffs have never hidden the fact that they are suing derivatively on behalf of the shareholders, and maintain their claim is "direct" in the manner that Judge Turner termed it: "a direct, vested interest in the surplus of potential recoveries."[6]

Defendant's motion to dismiss the FDIC for failure to state a claim can be dealt with quickly. Briefly, defendant

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[6] The court does not address the important issue of whether shareholder plaintiffs can recover directly from the government or whether all damages must be channeled through the receivership estate. The court, in both this and Judge Turner's opinion, believes that this determination is appropriately an issue to be resolved during the damage phase of the proceedings, by the Trial Judge. As Judge Turner stated, during a hearing conducted on a Motion for Clarification brought by the Security shareholders regarding his May 20, 1999 opinion on standing issues, in reference to whether damages must flow through the receivership estate: "To the extent about how the money will flow, nothing in my opinion or order should be read as binding a trial judge on that." August 16, 1999 Tr. at 11.

contends that the FDIC cannot maintain the claim on behalf of the failed thrift because the FDIC sold the claim for, as defendant describes it, valuable consideration, to the RTC-Corporate, an agency of the federal government. Since that claim is now owned by the FDIC-Corporate, also an arm of the government, the FDIC is actually bringing a claim owned by the government against the government: what the government calls a classic nonjusticiable government dispute.

The court has addressed this issue before, in *Glass v. United States,* 44 Fed. Cl. 73, 80-81 (1999), and there is no need to elaborate, since the facts appear indistinguishable. For the same reasons articulated in that opinion, the government's position here is untenable. The FDIC, in several briefs in this case and in Common Issue 11 briefing, has demonstrated the chain of title to show that it is the only party that can bring the claim on behalf of the Security receivership, and that it is bringing the claim lawfully on behalf of the receivership estate.[7]

MOTIONS FOR SUMMARY JUDGMENT

Defendant does not appear to contest that the agreements made with Security to effect the New North transaction and the Security Trust transaction were binding,

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[7] It does bear mentioning that defendant's position regarding who is the proper party in interest boils down to the proposition that there is no person or entity which, either on behalf of the receivership (which, of course, represents any unpaid private creditors and the shareholders) or the aggrieved shareholders, could bring a claim for breach of contract, *even if a contract existed, which the government breached, and which damaged the institution and its shareholders.*

dare we say even contracts. Defendant contends, however, that based on the clear contractual language the government never made an agreement as to the regulatory treatment of goodwill created in either transaction. As for the regulatory treatment of the FSLIC cash contribution and the ICC's, defendant contends that both agreements shift the risk of any regulatory change onto Security. The court will address each transaction in turn.

The New North Transaction

In a series of resolutions dated August 2, 1984, the Federal Home Loan Bank Board (FHLBB) determined that an assisted merger of New North with Security Savings would be a less costly alternative to liquidation. FHLBB Resolutions 84-402, 84-403 and 84-404. These resolutions expressly authorized the FSLIC to enter into agreements with Security necessary to implement the merger. On August 3, 1984, the FSLIC and Security executed several agreements, including an Assistance Agreement. The Assistance Agreement contained an integration clause, which states:

> This Agreement ... constitutes the entire agreement between the parties and supersedes all prior agreements and understandings of the parties in connection with it, excepting only resolutions or letters issued contemporaneously with this Agreement by the Bank Board or the [FSLIC].

Assistance Agreement § 18. The Assistance Agreement thus expressly incorporated the Board Resolutions.

Among the relevant terms here, the FSLIC agreed to infuse New North with $39 million in cash to bring its

book value to zero. The FSLIC also agreed to contribute $3.5 million in cash to the resulting thrift, and to issue a $7 million note in exchange for an ICC to be issued by Security. Assistance Agreement § 3(a)(1)(B) and § 4. The FSLIC also agreed to permit Security to include the $3.5 million cash contribution and the $7 million ICC note in its net worth for purposes of complying with the regulatory capital requirements. Assistance Agreement § 3(a)(4).

Plaintiffs contend that the agreement specifically recognized that Security Savings would be entitled to use the purchase method of accounting in connection with the transaction. Plaintiffs point to FHLBB Resolution 84-402, which is incorporated into the agreement pursuant to § 18 of the Assistance Agreement. The Resolution states, in pertinent part, that the newly merged entity:

> shall furnish analyses, accompanied by a concurring opinion from such accountant, satisfactory to the Supervisory Agent, (a) specifically describe, as of the effective date of the merger, any intangible assets on Security's books as a result of the merger, and (b) substantiate the reasonableness of the amounts attributed to such assets, *including goodwill,* and the reasonableness of the related amortization periods and methods. (Emphasis added)

Plaintiffs thus contend that the resolution expressly contemplated the use of supervisory goodwill and its amortization.

Defendant argues that, because the Assistance Agreement is silent as to the issue of the treatment of goodwill, while it expressly addresses the treatment of the cash contribution and the ICC's to net worth, the agreement was designed expressly to exclude any

agreement as to the treatment of goodwill. The government thus concludes the following: "Clearly, Section 3(a)(4) was included to indicate that the cash contribution and ICC were to be included in regulatory capital and *a fortiori,* goodwill was not." Def.'s Resp. to FDIC at 10.

For several reasons, defendant's argument is unpersuasive. First, as the FDIC points out, the ICC and cash contributions were referenced in the Assistance Agreement, because, at least in part, they are a form of financial assistance from the FSLIC, while the use of supervisory goodwill is an accounting mechanism. It is not, as the FDIC points out, "assistance", in that it does not involve a payment to Security as with the cash contribution and ICC. Second, were everything else in the contract silent about the use of goodwill, defendant might have an argument, but Board Resolution 84-402, which is part of the contract, quite clearly anticipates that plaintiffs were planning to use and amortize goodwill created as a result of the merger. Lastly, were there any ambiguity about the treatment of goodwill, it is certainly clear, at least regarding the New North merger, that the new institution would have been insolvent, and eligible to be seized immediately by regulators, had the new institution not been able to count the supervisory goodwill to meet its capital requirements. Thus, the very nature of the New North transaction suggests that the supervisory goodwill was necessary to make the transaction viable.[8]

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[8] The court notes that, as defendant correctly points out, the decision of the District Court was reversed by the Fifth Circuit on this issue, for consideration by this court on a claim for compensation. *See Security Sav. and Loan Ass'n v. Director, Office of Thrift Supervision,*

(Continued on following page)

The court believes that the question of whether the regulatory treatment of goodwill is a contractual requirement of the New North contract can be resolved without resort to any extrinsic evidence. However, the evidence adduced by the District Court that shows the regulatory treatment of goodwill was an essential term of this contract is absolutely overwhelming. Everything, from the FHLBB supervisory memo explaining the transaction to the Board, to the testimony of Security officers, to the testimony of government regulators themselves, to the conduct of the regulators after the merger, indicates that the government agreed to the accounting treatment requested by Security. The facts were set forth, with great clarity, by the District Court in 1991. *See Security Savings and Loan v. Director, Office of Thrift Supervision,* 761 F. Supp. 1277, 1281-84 (S.D. Miss. 1991). In light of this record, the court is surprised that this issue has been challenged so vigorously by defendant.

Second, defendant argues that a review of the core documents in the New North transaction reveals that the parties "expressly" shifted the risk of a change of the laws regarding the regulatory treatment of the thrift. The government cites with favor *Guaranty Fin. Serv. v. Ryan,* 928 F.2d 994, 999-1000 (11th Cir. 1991), and its favorable footnote invocation in the Supreme Court's *Winstar* decision for the proposition that the risk of regulatory change

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960 F.2d 1318, 1323 (1992). Tellingly, however, the Fifth Circuit was agnostic as to these conclusions of the District Court regarding the contractual issues in the case. Although the court is not bound by the District Court's findings and conclusions, the court finds the argument and logic of the District Court compelling.

was shifted to the thrift. *See United States v. Winstar Corp.,* 518 U.S. 839, 116 S. Ct. 2432, 2452 n. 15, 135 L. Ed. 2d 964 (1996).

The court has discussed both *Guaranty,* and the Supreme Court reference, in a prior decision. *See Castle v. United States,* 42 Fed. Cl. 859, 862-64 (1999). The court has also noted, generally, its reluctance to grant defendant's successor regulation argument much credence. *See California Fed. Bank v. United States,* 39 Fed. Cl. 753, 777-79 (1997). There is no doubt, however, that what the Supreme Court found compelling about the language in the *Guaranty* case was its clarity, so, at a minimum, the court must look to see whether the language in this instance was unambiguously clear as to the issue of which party bore the risk of regulatory change. However, the language cited by defendant in the New North transaction, contained in § 3(a)(4) of the Assistance Agreement, which supposedly shifts the risk of all regulatory change onto Security, could hardly be more *unclear.* Given the court's reluctance to accept the government's position that Security would allow bank regulators, at their leisure, to alter critical terms regarding the accounting treatment of goodwill, which could affect the viability of the institution, the government's argument cannot be taken seriously when the language relied upon by defendant is so unclear.[9]

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[9] Indeed, it appears from the briefing that the government may not even take the successor regulation argument, at least as it applies to the New North transaction, very seriously. It only merits very brief attention in the government's initial responses to the motions of the shareholder plaintiffs and the FDIC for summary judgment, and is not addressed at all in the government's 90-day response to the FDIC's motion for summary judgment.

The Security Trust Transaction

On October 25 1985, Bailey Mortgage Company, a wholly-owned subsidiary of Security Savings acquired Security Trust in an assisted acquisition very similar to the New North transaction. The Security Trust transaction was implemented pursuant to an Assistance Agreement signed by Security Savings, Bailey Mortgage, Security Trust and FSLIC. The Assistance Agreement, as in the New North transaction, contained an integration clause that expressly incorporated the contemporaneous documents and FHLBB board resolutions. Briefly, the transaction involved a cash contribution of $1.442 million, and the purchase of a $2 million ICC, by the FSLIC. In addition, the transaction permitted Bailey to include the cash contribution and ICC in its regulatory net worth.

Defendant makes the identical argument regarding the treatment of goodwill created as a result of the transaction, and for the same reasons discussed above regarding the New North transaction, the government's argument is unavailing.

As with the New North transaction, defendant argues that "successor regulation" language contained in the Security Trust Assistance Agreement explicitly shifted the risk of regulatory change onto Bailey Mortgage. Although defendant's argument in this instance is a bit more viable than the successor regulation argument regarding the New North transaction, because in this instance there is actually language in the Assistance Agreement to which defendant can point, the argument is ultimately no more compelling.

Defendant does concede in its briefing that its argument here is similar to that addressed in Common Issue

12 as part of the *California Federal* common issue process, but defendant nonetheless believes that it merits a closer look because the language in the Security Trust agreement is substantially similar to that used in *Guaranty*. However, a quick review of the language cited in *Guaranty* and that used in the Security Trust transaction proves this is not the case. The relevant language in the *Guaranty* deal contains a sentence which reads:

> All reference to regulations of the Board or the FSLIC used in the Agreement shall include any successor regulation thereto, *it being expressly understood* that subsequent amendments to such regulations may be made and that *such amendments may increase or decrease the Acquiror's obligation under this Agreement* (emphasis added by the 11th Circuit).

Guaranty at 999. There is no equivalent language in the Security Trust Assistance Agreement or any other contract document. It appears, then, that there is no substantive difference between the generalized successor regulation language in the Security Trust Assistance Agreement and in the cases discussed in *California Federal*. *See California Fed.* at 777-79. As in that case, the government argument here is similarly flimsy.[10]

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[10] Two other points bear mentioning. First, as the FDIC points out in its briefing, defendant points to language in the assistance agreement which requires maintenance of the *amount* of regulatory net worth over time, but then attempts to argue that Security was also liable for any changes in what could be *included* in net worth. Defendant's own argument requires a jump in logic that suggests this successor regulation language is far from unambiguous as defendant suggests it is here.

(Continued on following page)

CONCLUSION

The court concludes that Security Savings entered into a contract with the government to permit the thrifts to count supervisory goodwill and certain other items, including the FSLIC cash contributions and ICC's, in computing their regulatory capital requirements, and that the passage of FIRREA and its implementing regulations breached those contractual commitments. Although this issue was not the focus of the briefing on summary judgment, the court finds the analysis of the District Court persuasive regarding the applicability of the termination provisions of the New North and Security Trust Assistance Agreements and adopts the District Court's findings that the obligation as to the regulatory treatment of the cash contributions and ICC's was not terminated under the Termination provisions of the Assistance Agreements. *See Security Savings and Loan Association v. Director, Office of Thrift Supervision,* 761 F. Supp. 1277, 1279-81 (S.D. Miss. 1991). In addition, the court concludes that both the FDIC and the Security shareholders may pursue the claims on behalf of the failed thrift and its shareholders, although how damages will be distributed, should damages be found, is a question left for the Trial Judge.

Second, the government's point once again raises the fundamental implausibility of this entire line of argument. The government would have this and other agreements read in such a way that one of the contracting parties – in this case, the government – could at any time and for any reason fundamentally alter the terms of the agreement in such a way that the very survival of the institution could be jeopardized at the government's option. It is difficult to fathom that a rational contracting party would agree to such terms.

Accordingly, the motions of the Security plaintiffs and the FDIC for summary judgment as to liability are granted, and the cross-motions of defendant, to the extent that cross-motions were filed, are denied. The motions of defendant to dismiss plaintiffs are also denied. It is further ordered that, pursuant to RCFC 77(f), the Omnibus Case Management Order (September 18, 1996), and the Priority Cases Pretrial Scheduling Order (April 2, 1997), this case is assigned to Judge Emily C. Hewitt for all further proceedings, except for motions for clarification of this opinion.

LOREN A. SMITH, CHIEF JUDGE

H.C. BAILEY, JR., BAILEY MORTGAGE COMPANY, CAROL A. BAILEY, GLYNN HUGHES, HARPERVILLE IRREVOCABLE TRUST, JOAN B. BAILEY, JOHN T. COSSAR, KENNETH W. WARREN, LEWIS S. TILGHMAN, MADISON HILLS FARMS, INC., MALCO IRREVOCABLE TRUST, and W.C. BAILEY, Plaintiffs-Appellants, v. UNITED STATES, Defendant-Appellee.

02-5170

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2003 U.S. App. LEXIS 23816

October 28, 2003, Decided
October 28, 2003, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

OPINION:

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 4, 2003.

CONSTITUTION OF THE UNITED STATES OF AMERICA

U.S. CONST. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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12 U.S.C. § 1821 (2003)

* * *

(d) Powers and duties of Corporation as conservator or receiver

* * *

(11) Depositor preference

(A) In general

Subject to section (e)(2)(C) [12 USCS § 1815(e)(2)(C)], amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

* * *

(g) Subrogation of Corporation

(1) In general

Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation, upon the payment to any depositor as provided in subsection (f) of this section in connection with any insured depository institution or insured branch described in such subsection or the assumption of any deposit in such institution or branch by another insured depository institution pursuant to this section or section 13, shall be subrogated to all rights of the depositor against such institution or branch to the extent of such payment or assumption.

* * *

(3)

Supreme Court, U.S.
FILED
APR 30 2004
OFFICE OF THE CLERK

No. 03-1073

In the Supreme Court of the United States

H.C. BAILEY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that a thrift's shareholders, suing derivatively, have no claim against the government if the maximum amount of recovery on behalf of the thrift would be insufficient for the thrift to pay the government's legally prior claims on the thrift's assets.

2. Whether the government's breach of its contract with a thrift constituted a taking of any property rights the thrift's shareholders possessed.

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In the Supreme Court of the United States

No. 03-1073

H.C. BAILEY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 341 F.3d 1342. The opinions of the trial court on the issues of liability and contract remedies (Pet. App. 59a-76a; *id.* at 29a-58a) are reported at 47 Fed. Cl. 2 and 51 Fed. Cl. 265, respectively. The two opinions of the trial court on the issue of just compensation (Pet. App. 25a-28a; *id.* at 11a-24a) are reported at 53 Fed. Cl. 31 and 251.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2003. A petition for rehearing was denied on October 28, 2003 (Pet. App. 77a-78a). The petition for a writ of certiorari was filed on January 26, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioners own all of the outstanding shares of Security Savings (Security), a savings and loan association formerly chartered by the state of Mississippi. Pet. App. 2a; *id.* at 30a. In 1984 and 1985, Security and its wholly-owned subsidiary, Bailey Mortgage Company,[1] acquired two troubled thrifts. *Id.* at 2a.

In connection with those acquisitions, the Federal Savings and Loan Insurance Corporation (FSLIC) provided Security with approximately $46 million in cash assistance, more than enough to compensate for the negative net worth of the acquired entities. Pet. App. 68a-70a (cash assistance of $39 million and $3.5 million), 73a ($1.442 million plus $2 million). Neither petitioners nor Security contributed any amounts to the acquisition transactions. The courts below held that a contract had been formed between FSLIC and Security in connection with the acquisition, and that, pursuant to that contract, Security was permitted to count approximately $30 million in goodwill and other intangibles as assets for purposes of meeting regulatory capital requirements. *Id.* at 67a-76a; C.A. App. A20,282-A20,286 (Complaint).

When real estate values declined steeply in the late 1980s, a number of the non-traditional thrift investments made by Security declined in value. C.A. App. A30,006-A30,007. Security suffered net losses of $2.4 million in 1988. *Id.* at A20,300. The losses continued to increase in 1989, so much so that, in March 1989, the thrift's examiners concluded that the "asset quality and risk management problems which have had a negative impact on the operations and capital of the institution"

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[1] Security and Bailey are collectively referred to as "Security."

would, "if not corrected, threaten its continued existence." *Id.* at A30,488.

On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which abolished FSLIC and transferred all of its liabilities and assets to the FSLIC Resolution Fund (FRF), which was to be managed by the Federal Deposit Insurance Corporation (FDIC).

FIRREA also precluded thrifts from counting most of their goodwill and certain other intangible assets toward regulatory capital requirements. 12 U.S.C. 1464(t)(2)(C) and (3)(A). Initially, Security was able to blunt the effect of those provisions by obtaining injunctive relief in the United States District Court for the District of Mississippi, which prevented the deduction of intangible assets, including goodwill, from the calculation of Security's regulatory capital. *Security Sav. & Loan Ass'n* v. *Office of Thrift Supervision*, 761 F. Supp. 1277, 1278-1285 (S.D. Miss. 1991). On appeal, however, the United States Court of Appeals for the Fifth Circuit concluded that, even assuming that Security possessed a contractual right to count intangible assets toward regulatory capital requirements, Congress did not exempt any thrift from complying with FIRREA's terms. *Security Sav. & Loan Ass'n* v. *Office of Thrift Supervision*, 960 F.2d 1318, 1322-1323 (5th Cir. 1992). On remand, the district court transferred the case to the United States Court of Federal Claims, which denied Security's renewed request for injunctive relief. *Security Sav. & Loan Ass'n* v. *United States*, 26 Cl. Ct. 1000, 1003-1004 (1992).

In the meantime, the losses that Security had been suffering since well before the enactment of FIRREA continued to mount. Security lost a total of $7.5 million

in 1989, C.A. App. A20,302, prompting the FDIC, the successor to FSLIC, to state, on December 11, 1989, that Security "posed an undue risk to the Savings Association Insurance Fund." *Id.* at A30,492. The losses increased in 1990, *id.* at A20,304, and continued in 1991. *Id.* at A20,306.

Throughout this period before 1992, when Security had maintained, through injunction, the ability to count its intangible assets toward regulatory capital requirements, the thrift's financial condition continued to deteriorate. In October 1991, the FDIC, in its role as deposit insurer, concluded that, even if Security were permitted to count its intangible assets toward capital requirements, the thrift would require a $40 million capital infusion to return to viability. C.A. App. A30,496.

The regulators reiterated that conclusion several months later, in February 1992, explaining that "Security Savings essentially operates at a loss just by 'opening the door.' * * * This institution is not viable, irrespective of the outcome of the court decision on this goodwill, income capital certificates and unamortized cash assistance payments [the intangible assets that Security contended its contracts permitted it to include in the calculation of its regulatory capital]." C.A. App. A30,504.

As a result of Security's steady deterioration, on October 16, 1992, the Office of Thrift Supervision (OTS), the successor to the Federal Home Loan Bank Board, appointed the Resolution Trust Corporation (RTC) as receiver for Security. Pet. App. 2a-3a; *id.* at 32a.

After a series of transactions, the RTC, as receiver, sold Security's assets and deposit liabilities to several independent financial institutions. Pet. App. 3a, 32a-

33a. Because the assets available for sale were not sufficient to cover Security's deposit liabilities, the RTC, in its corporate capacity (RTC-Corporate), also provided the purchasing institutions with approximately $84.3 million in cash so that the assets plus this cash equaled the liabilities assumed by the purchasers. *Ibid.* By arranging for the deposit liabilities to be transferred and by facilitating that transfer with a payment of $84.3 million, RTC-Corporate became subrogated to the claims of Security's depositors against Security in the amount of the $84.3 million payment. *Id.* at 3a.

RTC-Corporate's subrogated claim was reduced over time as Security's remaining assets were sold. Pet. App. 3a, 33a. As of October 31, 2001, the subrogated claim, which represents amounts Security formerly owed to its depositors but had insufficient assets to pay, stood at approximately $66.4 million. *Id.* at 33a. The Security receivership owed other creditors, such as the Internal Revenue Service, smaller amounts. As of December 2000, Security's entire "receivership deficit"—the amount by which the estate's liabilities exceeded its assets—was $71.1 million, including the RTC's $66.4 million claim. *Id.* at 3a, 33a.

By statute, the RTC was terminated on December 31, 1995, and all assets and liabilities held by the RTC were transferred to the FRF. Pet. App. 33a-34a; see 12 U.S.C. 1441a(m)(1) and (2). Accordingly, the FRF, as successor to RTC-Corporate, now holds a $66.4 million claim against Security, representing amounts that were paid by the Government to relieve Security of its excess deposit liabilities. Pet. App. 3a; *id.* at 33a.

2. In 1992, petitioners brought suit in the Court of Federal Claims, alleging that, in applying FIRREA's new capital regulations to Security, the government

had breached contracts with Security that petitioners, as shareholders, were entitled to enforce derivatively. Petitioners also alleged that FIRREA had effected an uncompensated taking of their property interest in Security. Pet. App. 3a. Petitioners' complaint eventually was consolidated with the complaint Security had originally filed in district court in Mississippi, which had been transferred to the Court of Federal Claims. After Security was placed into receivership, the RTC, and later the FDIC, was substituted as a plaintiff in the consolidated case to represent the interests of Security's receivership estate. *Id.* at 30a.

The trial court granted summary judgment both to petitioners and to the FDIC as to contract liability, holding that Security and FSLIC had entered into contracts granting Security the right to count intangible assets toward regulatory capital requirements and that the enactment of FIRREA had breached those contracts. Pet. App. 68a-75a.

The trial court further held that the FDIC could pursue damages on behalf of Security's receivership estate. Pet. App. 75a. In addition, despite the presence of the FDIC in the suit as Security's representative, the court held that petitioners, as shareholders of Security, could also pursue Security's claims derivatively, to protect their rights in any surplus remaining in Security's receivership estate after payment of the estate's liabilities according to the relevant statutory distribution scheme. *Id.* at 65a-66a, 75a.

The court subsequently granted summary judgment to the government with respect to the contract damages theories advanced by petitioners and the FDIC. The primary contract damages theory sponsored by both petitioners and the FDIC involved the assertion that, in the absence of the breach of contract, peti-

tioners would have caused Security to exit the thrift business in order to concentrate on real estate development projects. Under that theory, referred to as the "debanking claim," the FDIC and petitioners sought the difference between the value that the hypothetical real estate development entity allegedly would have possessed at the time of trial and the negative value that the Security receivership currently possesses, *i.e.*, the so-called "receivership deficit." Pet. App. 61a.

The trial court rejected both aspects of the claim. First, the court held that neither petitioners nor the FDIC could recover any damages for the period after which they contend Security would have exited the thrift industry to create a real estate development firm and, thereby, would have relinquished the regulatory capital that was the claimed subject of the contracts. Pet. App. 41a.

Second, the court held that neither petitioners nor the FDIC could recover the "receivership deficit" as an element of damages in any event. As the court explained, rather than damages, the receivership deficit represents liabilities that Security owed, but avoided paying to, its creditors—*i.e.*, its depositors. Pet. App. 38a-41a. The court also held, in the alternative, that since the FRF, as successor to FSLIC's liabilities, would pay any judgment and since the payment would be made to the FRF, as successor to the subrogee of the depositors, Security's claims represented an intragovernmental, non-justiciable dispute. *Id.* at 40a-41a.

The trial court rejected the remainder of the contract damages theories advanced by petitioners and the FDIC for failure to establish a case or controversy. Pet. App. 44a-47a. The trial court also rejected petitioners' claims that there had been a taking and that

they were entitled to just compensation under the Fifth Amendment. *Id.* at 20a-24a.

3. The court of appeals affirmed the rejection of petitioners' contract damages claims and their claim under the Just Compensation Clause. Pet. App. 1a-10a.

a. As the court of appeals explained, the primary claim advanced by the FDIC and petitioners in the trial court was their "debanking" claim for $208.6 million of losses through 1998. Pet. App. 4a. Their theory was that Security would have "exited the thrift business and sold its retail banking deposits and branch offices in 1994" and would then have "established a holding company for direct investments in real estate and financial institutions" that would have had a high value, recoverable as damages, by the time of trial in 1998. *Id.* at 5a. The $208.6 million claim had two components: $68.2 million, which constituted the "receivership deficit" (the amount by which the receivership's liabilities exceeded its assets in 1998), and $140.4 million, which was alleged to be the value of what the "debanked" institution's assets would have been in 1998 absent the breach. *Id.* at 4a.

The court of appeals first rejected the conclusion that the receivership deficit was awardable as damages. As the court explained, that amount was "premised on the false assumption that the receivership deficit is an asset available for recovery by the FDIC for Security Savings." Pet. App. 5a. Rather than an amount of loss caused by the breach, the receivership deficit was simply the amount owed by the thrift, which mostly consisted of amounts "absorbed by the RTC when it paid Security Federal's deposit liabilities." *Ibid.* Second, the court held that the claim for the 1998 asserted value of $140 million had to be rejected, because "the damages award must be assessed as of the

time the bank would have ceded the benefit of the regulatory forbearances." *Id.* at 6a. The court held that, rather than the 1998 figure of $140 million, "the breach of contract damages must be capped at the alleged 1994 figure of $64 million." *Ibid.*

The court then held that the $64 million is also not awardable. The court explained that "the maximum potential award of $64 million" under this theory "is exceeded by the FRF's subrogated claim of $66 million." Pet. App. 6a. It therefore is "a nonjusticiable intragovernmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to another." *Ibid.* Because it could not result in any net benefit to FDIC, the court reasoned, it "does not satisfy the Article III, § 2, case or controversy requirement." *Ibid.*

The court held that the same conclusion follows with respect to petitioners' claim for $44 million, which they had asserted "for the first time" on appeal as "the value of the thrift in 1989." Pet. App. 6a. Even if that amount were awarded instead of the 1994 value asserted by the FDIC, it also "is exceeded by the $66 million" owed to the FRF on its prior claim. See 12 U.S.C. 1821(d)(11)(A). Accordingly, the court rejected petitioners' $44 million claim as well. Pet. App. 6a.

b. The court of appeals also rejected petitioners' claim that FIRREA had effected a taking of their property without just compensation. Pet. App. 7a-9a. Applying long-standing precedent, the court of appeals held that "[i]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver." *Id.* at 7a-8a (quoting *Branch* v. *United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995)).

The court of appeals rejected petitioners' argument that the government's breach of contract in enacting

FIRREA constituted a regulatory taking. The court held that petitioners were not parties to the contracts between Security and FSLIC, and that accordingly "this theory of an alleged taking of the contract * * * must be asserted by the FDIC." Pet. App. 8a. The court also held that, although petitioners had "a property interest in any liquidation surplus" of the thrift, the statute "preserves the right of the shareholders to a potential recovery" and therefore "does not take [their] property interest in the surplus or [their] right to pursue the remedy." *Id.* at 9a. The court reiterated that the amount that Security owed its creditors—the receivership deficit—was not an asset of Security. Petitioners were unable to obtain a recovery because "there is no liquidation surplus" that could have been taken. *Ibid.*

ARGUMENT

The fact-bound decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

A. Petitioners' Contract Claim

1. Petitioners contend (Pet. 13-15) that the court of appeals erred in rejecting their claim, first raised on appeal, for $44 million in contract damages.[2] The court

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[2] Contrary to petitioners' contention (Pet. 10 n.3), the court of appeals' conclusion that the $44 million claim for breach-of-contract damages was raised for the first time on appeal was correct. Pet. App. 6a; see *id.* at 37a-54a (trial court's decision reviewing all of the contract damages theories pursued by petitioners and the FDIC). Petitioners cite two documents in which they allege they raised a contract claim for $44 million. The first, "Shareholder Plaintiffs' Opposition to Defendant's Motion for Summary Judgment," alludes to a possible "alternative" restitution claim based

of appeals correctly rejected that claim, because even an award to petitioners, acting on behalf of the estate of the thrift, of the maximum amount of damages that petitioners' damages theory could permit would be insufficient to pay the government its legally prior claims against the estate.

As the court of appeals explained, the "debanking" theory on which petitioners (and the FDIC) relied in the trial court could, if accepted, support a maximum damages award of $64 million. Pet. App. 6a ("[T]he breach of contract damages must be capped at the alleged 1994 figure of $64 million.").[3] The court of appeals correctly held, therefore, that, because "the maximum potential award of $64 million is exceeded by the FRF's subrogated [and legally prior] claim of $66 million," "[n]either Bailey nor any other private creditor could benefit" even if it were established that Security were entitled to that maximum award. *Ibid.*

As the court of appeals recognized, if even an award of $64 million would be insufficient to leave petitioners with anything after the government's legally prior claim for $66 million were paid, it follows *a fortiori* that

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upon the value of Security as of 1989, *id.* at 39a-40a, but does not suggest a $44 million value. Instead, that document merely states that the value of Security is a "disputed fact." *Id.* at 40a. The second document, a "Memorandum In Support Of Shareholder Plaintiffs' Motion For Partial Summary Judgment On Takings Claim," relates solely to petitioners' takings claim. The court of appeals did not suggest that petitioners' takings claim for $44 million was raised for the first time on appeal. The court of appeals rejected petitioners' takings claim on its merits.

[3] The trial court calculated that figure, which "represents the market value of what the FDIC maintains that, but for the breach, Security Savings would have had as of year-end 1994 pursuant to its de-banking strategy ($15.0 million) and the deficit of Security receivership at year-end ($49.1 million)." Pet. App 37a-38a.

an award of the $44 million petitioners claimed for the first time on appeal would similarly leave them with nothing. That is precisely what the court of appeals said in its brief reference to petitioners' late-advanced $44 million claim: that claim "does not help [petitioners] because it also is exceeded by the $66 million." Pet. App. 6a. So long as the government retains its subrogated claim, entitled to priority, for $66 million, no award to the thrift's estate of less than that amount would be sufficient to result in any recovery for petitioners.

Contrary to petitioners' contention (Pet. 13) that "the court of appeals held that Petitioners' claim against the Government was extinguished by the intra-governmental dispute doctrine," the doctrine that the government, as a general matter, may not sue itself has nothing to do with the court's rejection of petitioners' claims. Petitioners' claims on behalf of Security were rejected because they could not have resulted in any surplus to the receivership estate and, consequently, any net award to petitioners. FDIC's claims, which were "intragovernmental," were similarly rejected. See Pet. App. 6a ("The expectation damage claim is * * * a nonjusticiable intragovernmental dispute because any damage award recovered from the government by the FDIC would flow to the FRF, from one government coffer to the other."). But that rejection too had nothing to do with a rule prohibiting the government as a general matter from suing itself. Rather, as the court of appeals' citation (see *ibid.*) to its decision in *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365, 1382 (2001), indicates, the FDIC's claims were nonjusticiable because the government was a creditor of the receivership estate in an amount greater than any amount the estate could hope to recover from the

government. Any party in that situation would have a nonjusticiable dispute. See *ibid.* (stating that it was "not holding that all claims by the FDIC against the government will fail to satisfy the case-or-controversy requirement," but instead that "where the FDIC has not asserted claims for recovery in excess of what the failed thrift owes to the government, the case-or-controversy requirement is not satisfied").

2. Petitioners do not dispute that the receivership statute legitimately gives the government's subrogated claim priority over their own derivative claim on behalf of Security. They contend, however, that "[t]he court of appeals accepted as true that but for the breach the thrift would have * * * been worth at least $44 million" (Pet. i), and that "this Court must accept as true that an award of contract damages against the United States in an amount calculated to put Security's estate in the position it would have occupied but for the Government's breach would yield a surplus of not less than $44 million payable to Petitioners." Pet. 13.

Those contentions are mistaken. The court of appeals never accepted as true that Security would have had a positive net worth of $44 million but for the breach, and in the current posture of this case, that fact cannot be assumed. Once the Government sought and supported its motion for summary judgment, petitioners bore the burden of "present[ing] affirmative evidence" in order to avoid summary judgment. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Petitioners did present (disputed) evidence that Security had a net worth of $44 million in 1989. But FIRREA had no effect on petitioners at that time and caused them no loss. To the contrary, they were protected by injunction from FIRREA's effects for substantial periods until 1992. See pp. 3-4, *supra*. Meanwhile, the evidence

showed that, during the period between 1989 and 1992, Security's losses from its continued operation (but not caused by FIRREA) mounted, until Security was seized in 1992 and ultimately liquidated at a cost of $66 million. See Pet. App. 3a. Petitioners presented no evidence that that loss (the "receivership deficit"), which was paid by the government, was caused by the government's breach, which consisted in the government's refusal to allow Security to count intangible assets toward regulatory capital requirements.[4] Nor, in light of the injunction that protected Security from the effects of the breach, would any such showing have been likely.

Petitioners contend (Pet. 13) that "[t]he court [of appeals] reasoned * * * that the receivership deficit must be excluded from Security's contractual claim on the ground that the Government cannot recover its own $66 million subrogated claim from itself." The basis for

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[4] The only record evidence demonstrated that Security was losing money prior to the breach, C.A. App. A20,300, A20,302, obtained an injunction to prevent the "breaching provisions" of FIRREA from being applied to it, Pet. App. 61a-62a, and continued to lose tens of millions of dollars after obtaining the injunction, C.A. App. A20,304, A20,306. The unchallenged evidence also demonstrated that, during the pendency of the injunction, the regulatory authorities concluded that Security would need a $40 million capital infusion to return to viability, regardless of whether it was permitted to count its intangible assets toward capital requirements. *Id.* at A30,496. In fact, petitioners' primary contract-based claim before the trial court, the "debanking claim," rested upon the notion that petitioners would cause Security to exit the thrift industry because its operations were incompatible with the "non-breaching" provisions of FIRREA. Pet. App. 5a. Accordingly, on this record, the court of appeals clearly was not required to accept petitioners' current assertion that Security would have been worth $44 million in the absence of the breach.

excluding the receivership deficit from any claim in this case was that the deficit was not a measure of contract damages—*i.e.*, it was not "an asset available for recovery." Pet. App. 5a. Instead, it was simply a measure of the amount by which Security's liabilities—mostly deposit liabilities—exceeded its assets. Although petitioners now contend (Pet. 15) that the receivership deficit was "foreseeable consequential damage that Security's receivership estate would not have incurred but for the breach," there was in fact no evidence that that amount was lost as a result of the government's breach of contract, rather than as a result of the consistent losses that Security's operations had caused. For that reason, the receivership deficit was not awardable as expectation damages.

For the foregoing reasons, as the court of appeals held, that loss both (a) does not form any part of the damages recoverable by petitioners on behalf of Security, see Pet. App. 5a (noting the "false assumption that the receivership deficit is an asset available for recovery by the FDIC for Security Savings"), and (b) is recoverable by the government pursuant to its prior claim on Security's estate, see *id.* at 3a (noting government's "subrogated claim" of approximately $66 million), 6a (same).

3. Petitioners contend (Pet. 16) that the judgment of the court of appeals "eviscerates" this Court's holding in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), that, "[w]hen the United States enters into contract[ual] relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at 895 (quoting *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)). In fact, as noted above, the court of appeals adhered to that

principle and did not rely upon any rules peculiar to the government in rejecting petitioners' claim.

Petitioners also contend (Pet. 16-17) that a hypothetical example drawn from the Glendale transaction before the Court in *Winstar* supports their claim for contract damages. *Winstar* itself did not involve any damages analysis. See *Winstar*, 518 U.S. at 860 ("We decide whether the Government may assert four special defenses to respondent's claims for breach."). In any event, petitioners' calculation with regard to Glendale is mistaken.

Petitioners assume (Pet. 16-17) that Glendale, which possessed a book-value net worth of $277 million, acquired a thrift with net liabilities of $734 million. They further assume that, the very next day, as a result of the government's breach of contract regarding the calculation of regulatory capital, Glendale was placed in receivership. Petitioners contend that the decision in this case would have prevented Glendale from recovering its pre-acquisition book value of $277 million.

Nothing in the decision of the court of appeals in this case dictates the conclusion petitioners suggest in their hypothetical. Unlike in the hypothetical, Security did not purchase institutions with substantial net liabilities, nor did petitioners infuse any capital into the acquired institutions. At the time of the transactions at issue in this case, FSLIC paid Security an amount equal to the negative net worth of the thrifts Security acquired. Moreover, in the ensuing years, Security operated at a substantial deficit without regard to the provisions of FIRREA that caused a breach of contract.

Accordingly, whereas in the Glendale hypothetical the "receivership deficit" may well be traceable to the deficit in the purchased institutions, the receivership

deficit in this case was not traceable to any deficiency in capital in the acquired institutions.

4. Finally, petitioners contend (Pet. 19) that the court's decision is part of "a consistent body of post-*Winstar* Federal Circuit jurisprudence that has repeatedly denied plaintiffs any meaningful damages." Petitioners are incorrect. In each *Winstar*-related case, the Federal Circuit, as it did here, has identified the applicable law and applied it to the facts of the case to determine whether the trial court's decision regarding damages was correct. In the process, the Federal Circuit has affirmed the award of tens of millions of dollars of damages to plaintiffs in *Winstar*-related cases, including cases in which the thrift had been placed into receivership. See, *e.g.*, *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365 (Fed. Cir. 2001) (affirming the award of $21.5 million to the acquirer of a failed thrift); *Bank United* v. *United States*, 80 Fed. Appx. 663 (Fed. Cir. 2003). Cf. *LaSalle Talman Bank* v. *United States*, 317 F.3d 1363, 1370-1375 (Fed. Cir. 2003) (reversing trial court's decision denying lost profits); *Bluebonnet Sav. Bank* v. *United States*, 266 F.3d 1348 (Fed. Cir. 2001) (reversing finding of zero damages); *California Fed. Bank* v. *United States*, 245 F.3d 1342, 1349-1352 (Fed. Cir. 2001) (reversing summary judgment as to lost profits claim).

B. Petitioners' Takings Claim

Petitioners contend (Pet. 20-30) that the court of appeals erred in rejecting their claim under the Just Compensation Clause. The court of appeals correctly held that there was no taking of the thrift institution itself, because the placement of the thrift into receivership under the regulatory scheme was not a taking. Pet. App. 7a-9a. The court also correctly held that

there was no taking of the thrift's contracts with the regulatory agency, because the contracts created only an expectation of performance or, in the event of breach, contract damages. *Id.* at 8a-9a. Finally, the court correctly held that there was no taking of petitioners' interest in a liquidation surplus, because petitioners' interest in a surplus—had one been generated —was at all times protected by the thrift receivership distribution statute, 12 U.S.C. 1821(d)(11). See Pet. App. 9a.

1. Petitioners contend that the court of appeals held that "the Government's seizure of a regulated financial institution may not, under any circumstances, constitute a taking of property under the Fifth Amendment." Pet. 20. Petitioners do not and cannot refer to any portion of the court of appeals decision to support that contention, because the court did not so hold. Instead, the court held that "it is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver." Pet. App. 7a-8a. The question whether a taking occurs depends on "the cause of the insolvency." *Id.* at 8a. In this case, the court of appeals held that the cause of the insolvency was not sufficient to constitute a per se taking. *Ibid.* That is not a holding that the seizure of a bank could never constitute a taking of property.

2. Petitioners contend (Pet. 23) that Security's contract with FSLIC gave rise to a reasonable investment-backed expectation "that the Government would not seize their thrift based solely upon regulatory noncompliance that was directly caused by the Government's breach of its regulatory capital contract." The court of appeals correctly rejected that contention because petitioners were not parties to Security's contracts and because, in any event, petitioners, "through the FDIC,

w[ere] not deprived of a contractual remedy for the government's breach." Pet. App. 8a. As this Court held in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 n.27 (1949), the right of a non-breaching party to a contract with the government to seek contract damages for the government's breach of contract forecloses a claim that the government's breach constituted a taking. Cf. *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, * * * it is an interest * * * that can be fully protected by an ordinary breach-of-contract suit.").

3. Petitioners contend (Pet. 27) that their property interest was taken by virtue of the fact that the "contract damages action [was] itself controlled *by the Government.*" Petitioners are incorrect. The United States did not control the contract claim of either the FDIC or of petitioners. In fact, the government requested, unsuccessfully, that the FDIC's claims be dismissed in this case because the FDIC's predecessor, the RTC in its corporate capacity, *i.e.*, the government, had purchased the thrift's claim from Security's receivership. See Pet. App. 66a-67a. Moreover, the court of appeals expressly found that the FDIC "avidly pursued contract damages on behalf of Security Savings." *Id.* at 9a. Finally, the FDIC was not alone in pressing the thrift's breach of contract claim. Rather, the trial court established a procedure, contrary to the law governing derivative actions, through which petitioners also were permitted to "pursue the claims on behalf of the failed thrift," *id.* at 75a, to protect their interest in any liquidation surplus. *Id.* at 66a. Accordingly, the government did not control the breach of contract claims in this case.

4. Petitioners contend (Pet. 23-26) that the decision of the court of appeals is inconsistent with *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), or *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). Petitioners are mistaken.

Neither *Monsanto* nor *Kaiser Aetna* involved a contract between a private party and the government. *Monsanto* involved the government's appropriation and destruction of private property—trade secrets—entrusted to the government, and *Kaiser Aetna* involved a federal requirement that a private entity may not exclude the public from real property it owned. Although in each case the government had made a commitment of some sort that was relevant in assessing whether the property owner had an investment-backed expectation, neither case involved a contract, and the Court had no occasion to—and did not—in either case address any question regarding contract law or the availability of a remedy under the Just Compensation Clause for the government's breach of a contract.

5. Petitioners contend (Pet. 27-28) that the court of appeals erred in failing to hold that the government's breach of the thrift's contracts, in combination with the applicable receivership distribution statute, effected a taking of their interest in the thrift's "liquidation surplus." That contention is also incorrect.

The court of appeals held that, pursuant to the applicable thrift receivership distribution statute, 12 U.S.C. 1821(d)(11)(v), petitioners possessed a property interest in any surplus generated by Security's liquidation. Pet App. 9a. The court also recognized, however, that petitioners' property interest was contingent upon the liquidation actually generating a surplus. *Ibid.* Security's liquidation did not and could not generate a surplus, because the Security receivership currently

possesses a deficit, representing amounts it has failed to pay its creditors, and that deficit exceeds any potential recovery for breach of its contracts.[5] *Id.* at 4a-6a. The court correctly held that there could be no compensable taking of a non-existent surplus. *Id.* at 9a.[6]

6. Finally, petitioners mistakenly contend (Pet. 29-30) that the decision of the court of appeals conflicts with *Armstrong* v. *United States*, 364 U.S. 40 (1960). In *Armstrong*, the petitioners possessed liens as materialmen under state law on boats that a contractor was constructing for the government. When the contractor defaulted, the government took title to the boats which, due to the doctrine of sovereign immunity, had the effect of destroying the liens. This Court held that the destruction of the liens constituted a taking of the value of the liens.

Petitioners assert (Pet. 29) that, here, "[a]s in *Armstrong*, the Government applied, 'for its own advantage,' the special rule arising from the Federal Circuit's understanding of Article III and the priority statute to

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[5] This would be true regardless of the identity of the creditors, whether private parties or the government insurer as subrogee of Security's depositors.

[6] Petitioners attempt (Pet. 28) to analogize this case to one in which a hypothetical statute required that "damages shall be reduced in an amount equal to the net liquidation costs and any other expenses incurred by the United States in connection with any receivership of a thrift institution seized as a result of the [government's] breach of contract." The analogy is inapt because the court did not reduce the damages in this case by the liquidation costs of the thrifts. Instead, it held that the "surplus" petitioners claim would never have materialized, because more senior creditors (in this case, largely advancing the FRF's claims on behalf of depositors) would swallow up any recovery.

pay the losses it inflicted on itself rather than those it inflicted on Petitioners." The premise of petitioners' argument is incorrect. As explained above, see pp. 12-13, *supra*, the court of appeals did not apply any "special rule" arising from "Article III and the priority statute" in this case. Instead, the court, in its brief discussion of petitioners' newly asserted $44 million claim, simply applied the settled priority rules to find that no surplus that petitioners could recover would be left after other creditors of the Security estate obtained the recoveries to which they were entitled. Pet. App. 9a.

Moreover, in reaching its decision in *Armstrong*, the Court emphasized that the liens at issue were not the subject of any "contractual arrangements." 364 U.S. at 46. *Armstrong* does not support petitioners' position here, where the relations between the thrift and the government were the subject of contractual arrangements, and both the FDIC and petitioners remained free to pursue the thrift's contractual rights and remedies. Pet. App. 8a-9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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H.C. BAILEY, JR., W.C. BAILEY, JOAN B. BAILEY, HARPERVILLE IRREVOCABLE TRUST, JOHN T. COSSAR, GLYNN HUGHES, LEWIS S. TILGHMAN, KENNETH W. WARREN and MADISON HILLS FARMS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA and the FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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OTHER

U.S. CONST. art. III, § 2 ..... 3, 4, 7, 8

The Government cannot disagree with the central proposition at the core of the petition, and therefore it cannot and does not defend the decision below on its own terms. Instead, it is forced to invent a new justification for that decision, one which it has never argued before and which is demonstrably false.

The petition advances a simple proposition: where the owner of a seized thrift can prove that, but for the Government's breach of a *Winstar*-type contract, the thrift would have survived and had positive value of no less than $X, the thrift owner must be entitled to recover $X. The Federal Circuit's decision rejects that simple proposition *as a matter of law*; yet, the Government's opposition to the petition does not even dispute it. Instead, it argues that summary judgment was properly entered against Petitioners because Petitioners failed to present "affirmative evidence" to support the claim that their thrift, Security Savings & Loan Association ("Security"), would not have failed but for the breach. That argument was never made to the court of appeals, was never advanced as a ground for summary judgment to the Court of Federal Claims ("CFC"), is entirely at odds with both the Federal Circuit's and the CFC's rulings, and, to boot, is totally false.

The Government's unwillingness to dispute Petitioners' core proposition is understandable. For the proposition is nothing more than the application of straightforward, black letter contract law: a defendant is liable for the foreseeable damages proximately caused by its contract breach. Here, the Government does not and cannot deny that it plainly foresaw that the breach of its regulatory capital promise would very likely cause Security (along with dozens of other thrifts) to fall out of capital compliance and to be placed in receivership, which in turn would surely lead to the creation of a receivership deficit. Thus, to defend the Federal Circuit's decision on its own terms would require the Government to explain why ordinary contract law does not apply in this context. This it cannot do. Eight years ago, this Court held that ordinary contract principles *must* apply in precisely this context. *United States v. Winstar*, 518 U.S. 839 (1996). If the holding of

Winstar means anything at all, it must surely mean that where the facts show that a plaintiff's thrift was seized by the Government solely because of the Government's breach of its *Winstar*-type contract, that owner must be entitled to recover something.

1. The Federal Circuit held that Petitioners "breach of contract damages must be capped at the alleged 1994 figure of $64 million." Pet. App. 6a. That $64 million reflected what the Petitioners' expert opined that the thrift seized by the regulators in 1992 would have been worth in 1994 had the Government honored its regulatory capital contract. Pet. App. 37a-38a. Alternatively, Petitioners sought as a more conservative measure of damages the value of their thrift prior to the seizure – $44 million – again on the express factual assertion that Security would not have failed but for the breach.

The Federal Circuit did not reject Petitioners' factual claim that Security would have survived but for the breach, and would have been worth between $44 million and $64 million. Instead, it ruled that "[n]either Bailey nor any other private creditor could benefit if the FDIC fully recovered its alleged contract damage claims because the maximum potential award of $64 million is exceeded by the FRF's subrogated claim of $66 million." Pet. App. 6a. Likewise, it concluded that Petitioners also could not recover damages of $44 million "because it also is exceeded by the $66 million." *Id.* The $66 million "subrogated claim," of course, represents the cost to the Government of a receivership that was caused by the Government's own breach of contract to the seized thrift. The Government's subrogated claim thus is a liability of the thrift in receivership, reflecting the losses incurred during the fire sale of the bank's assets, plus interest charges and other expenses that, according to Petitioners' never-rejected factual assertions, would not have been incurred but for the breach. Thus, the summary dismissal of Petitioners' case was affirmed because the positive value that their thrift would have had but for the breach ($64 million) was less than the negative value it had because of the breach ($66 million).

Let there be no mistake as to the extreme nature of this legal conclusion: if it is correct, then the Government could have *stipulated* below that Security would have survived but for the breach and would have been worth $64 million, and still the Federal Circuit would have held that neither Security nor its owners are entitled to recover anything. The Acting Solicitor General does not and cannot defend that rule of law. It is, quite simply, indefensible: as explained in the petition, it mangles Article III's "Case or Controversy" requirement, and works an appalling injustice on all thrift owners whose institutions were seized by the Government as a direct result of the Government's breaching its *Winstar* contracts, thereby undermining the *Winstar* decision itself.

2. Unable to defend that rule, the Acting Solicitor General tries to hide it. First, the Government tries to portray the case as a simple application of the statutory priority scheme that applies to thrift receiverships, under which governmental creditors must be paid first. Thus, it nonchalantly states that Petitioners' claims were rejected as nonjusticiable simply "because the government was a creditor of the receivership estate in an amount greater than any amount the estate could hope to recover from the government." Opp. 12-13.

But the obvious answer to this explanation is that the Government's claims against the estate were themselves *caused* by the Government's breach of contract: that is, but for that breach, Security would not have failed, and there would have been no "subrogated claim," no fire sale of the thrift's assets, no interest charges, no administrative expenses, and hence *no receivership deficit*. Thus, because the receivership itself was caused by the breach, it is simply not correct to state that the receivership deficit "was not 'an asset available for recovery.'" Opp. 15 (quoting Federal Circuit's opinion, at Pet. App. 5a). Rather, if it

was caused by the breach, that deficit must be recoverable as part of any expectancy damage award.[1]

That central proposition is the crux of Petitioners' entire case, and the Acting Solicitor General does not contest it. Nowhere in its opposition does the Government argue that the result below can be defended if the facts demonstrate – as they do – that Security would not have failed but for the breach.

3. Instead of contesting the central legal proposition of the petition, the Government attacks its key factual predicate, stating that "[t]he court of appeals never accepted as true that Security would have had a positive net worth of $44 million but for the breach, and in the current posture of this case, that fact cannot be assumed." Opp. 13. It goes on to assert that "Petitioners presented no evidence that [its] loss (the 'receivership deficit'), which was paid by the government, was caused by the government's breach." Opp. 14.

This is the heart of the Government's opposition. Only by arguing that "Petitioners presented no evidence that that loss (the 'receivership deficit') . . . was caused by the government's breach," is the Government able to resist Petitioners' proposition that the receivership deficit must be recoverable if the receivership itself was caused by the

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[1] To be sure, it does not matter to the private creditors and shareholders of Security whether the governmental liabilities in the receivership deficit are actually awarded as expectancy damages against the Government, since they represent amounts that would then be paid back to the Government under the priority scheme. What matters is simply that these losses, which the Government inflicted on itself as a result of its contract breach, not be allowed to offset the losses inflicted by the breach upon private shareholders whose thrift would have survived and been valuable were it not for the Government's breach. Thus, regardless of what Article III may require with respect to "awarding" *to the Government* its receivership deficit as an item of damages *against the Government*, it must not be allowed to obscure the basic proposition that private thrift owners must be entitled to some compensation if the facts demonstrate that they have lost a valuable thrift solely because of the Government's breach of contract.

breach. Yet it is precisely by advancing this assertion that the Government confirms that *certiorari* must be granted.

First, the Federal Circuit held that Petitioners must be dismissed *as a matter of law*, "even if" they can prove that Security would have survived and prospered but for the breach. The opposition itself admits this, as it describes the court of appeals decision as holding that, "because 'the maximum potential award of $64 million is exceeded by the FRF's subrogated [and legally prior] claim of $66 million,' '[n]either Bailey nor any other private creditor could benefit' *even if it were established that Security were entitled to that maximum award.*" Opp. at 11 (emphasis added) (citation omitted) (alterations in original). But Security would be entitled to an award of its but-for value only if the court concluded that the breach caused it to fail, and therefore caused the receivership deficit. Petitioners advanced an *expectancy* theory of damages – i.e., they sought to recover the profits their bank would have earned but for the breach. That entire theory is obviously predicated on the baseline factual assertion – supported by an expert report and other evidence – that the bank would not have failed but for the breach. Thus, the Federal Circuit (like the trial court) did indeed "assume" that the bank would have survived – and prospered – but for the breach. At a minimum, both courts made clear that the existence of such a fact would in no way have changed their decision to summarily dismiss Petitioners' case.

The Government cannot defend that legal conclusion, and therefore it invents a new one – Petitioners' alleged failure to "'present affirmative evidence.'" Opp. 13 (citation omitted). But it is crystal clear that neither the CFC nor the Federal Circuit relied in any way upon an "absence of evidence" that Security would have survived if the Government had honored its regulatory capital contract. There is not the slightest hint of that rationale in either opinion. Thus, if this Court refuses to grant *certiorari* based upon the "absence of evidence" argument, it will leave in place a legal holding that is so obviously wrong the Government refuses to defend it on its terms.

Not only is the newly-invented "absence of evidence" argument absent from the two decisions below, it also cannot be found anywhere in the lower court briefs submitted by the Government. The Government never claimed that it was entitled to summary judgment on the ground that Petitioners had failed to present "affirmative evidence" to create a genuine issue as to whether Security would have failed even absent the breach. Thus, the Government is defending the Federal Circuit's affirmance of the CFC's summary judgment by articulating a basis for dismissal that was never even surfaced before the trial court. This is especially egregious because Petitioners could have, and would have, offered in the trial court whatever evidence was necessary to create a genuine issue for trial on this key factual question.

Indeed, even though the Government did not raise this argument below, Petitioners more than amply satisfied any possible burden they conceivably could have had. Most importantly, Petitioners presented the trial court with an expert report in which the expert testified that as soon as FIRREA became effective, Security faced "an immediate capital compliance problem *as a direct consequence of the breach*" of the Government's regulatory capital promises. C.A. App. A30,008 (emphasis added). In addition, his report stated that "but for the breach," Security would have undertaken a business strategy that "would have allowed [Petitioners] to retain the value of their investment *and prevent the seizure and liquidation of Security Savings by the Government.*" *See* C.A. App. A30,010 (emphasis added). This expert marshaled all of the relevant financial reports and other evidence necessary to opine on Security's ability to survive but for the breach. His report was produced in association with Security's former Chief Financial Officer, who likewise demonstrated the thrift's ability to prosper absent the breach. Thus, Petitioners certainly presented sufficient evidence to withstand even the hypothetical summary judgment argument that the Government now acts as if it advanced.

Perhaps most powerful of all, however, is the evidence inherent on the face of the record: In the fall of 1990,

Security sought and received a district court injunction requiring the Government to honor its regulatory capital contracts. *Security Sav. & Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277 (S.D. Miss. 1991). Even though Security was clearly out of capital compliance due to the breach, it was not seized during the pendency of this injunction. However, the Fifth Circuit subsequently reversed the injunction and transferred the case to the CFC, where Security once again immediately sought injunctive relief. *Security Sav. & Loan Ass'n v. Director, OTS*, 960 F.2d 1318 (5th Cir. 1992). Less than one week after the Federal Circuit affirmed the CFC's denial of injunctive relief, the Government seized the bank. Thus, as soon as the threat of injunctive relief was lifted, the Government knew that it was free to disregard its regulatory capital contract, and immediately placed Security into conservatorship. This history alone demonstrates that if the Government had been required to honor its regulatory capital contract, it would not have been able to seize Security.

In sum, there can be no doubt that Petitioners affirmatively presented ample evidence to the trial court to demonstrate that they would not have lost their thrift but for the Government's breach. The Government's synthetic basis for rationalizing the unjustifiable result reached by the courts below cannot stand.

4. The Government argues that Article III's "intragovernmental dispute doctrine" has "nothing to do with the court's rejection of Petitioners' claims." Opp. 12. It argues that Petitioners' damages claims "were rejected because they could not have resulted in any surplus to the receivership estate and, consequently, any net award to Petitioners." *Id.* But the only reason that Petitioners' damages claim "could not have resulted in any surplus" is that the receivership deficit, according to the courts below, could not be included in any damages claim. This meant that under the priority scheme the entirety of any damages award recovered by Petitioners would have to be paid over to the Government – the breaching party – to satisfy the receivership deficit.

Thus, whether the intra-governmental dispute doctrine was implicated depends upon the reason that the courts below held that the receivership deficit could not be included in the calculation of expectancy damages. As the petition recounts, the CFC offered two reasons: one was its view that the receivership deficit is an "obligation" rather than a "claim" on Security's balance sheet – wholly ignoring the fact that this "obligation" was directly caused by the Government's breach, and hence is as recoverable as any other liability or loss caused by the breaching party to the non-breaching party; the other reason was the CFC's conclusion that "'the receivership deficit claim is a non-justiciable intra-governmental controversy.'" Pet. 8-9 (quoting Pet. App. 39a-40a). Thus, the CFC's decision was clearly founded, at least alternatively, on Article III's "intra-governmental" dispute doctrine.

The Federal Circuit offered only a one sentence explanation for affirming the CFC's holding that the receivership deficit could not be included in the thrift's damage claim: "The claim for the recovery of the receivership deficit is predominantly held by the FRF because the largest portion of it is that which was absorbed by the RTC when it paid Security Federal's deposit liabilities." Pet. App. 5a. While the petition explains why this sentence is best understood as endorsing the CFC's intra-governmental dispute doctrine holding, *see* Pet. 11 n.4, it simply does not matter what this opaque sentence means. All that matters is that the Federal Circuit held that the Government is not answerable in damages for its breach of a *Winstar*-type contract where that breach directly, proximately, and foreseeably caused the bank to be placed into receivership, and where the receivership generated losses to the Government that were greater than the losses caused by the breach to the private owners of the thrift – i.e., the positive value of the thrift that was destroyed.

As the CFC's decision illustrates, there are in fact two different ways to describe that holding. At best, it is a grotesque distortion of what Article III requires, interposing the intra-governmental dispute doctrine as an obstacle to the ability of private plaintiffs to recover damages that they have personally suffered. At worst, it is an abrogation

of ordinary contract law – specifically, of the basic notion that foreseeable consequential losses caused by the breach (here, the receivership deficit) are recoverable – that is so flagrant, and so obviously wrong, that it can only be understood as an open defiance of this Court's holding in *Winstar* that these cases must be governed by "ordinary principles of contract construction and breach that would be applicable to any contract action between private parties." *Winstar*, 518 U.S. at 871. Unless *certiorari* is granted in this case, the Federal Circuit's decision threatens to convert that holding into nothing more than a cruel hoax.

5. The Government denies that the Federal Circuit's decision means that the Government's seizure of a thrift "'may not, under any circumstances, constitute a taking of property under the Fifth Amendment.'" Opp. 18 (quoting Pet. 20). According to the Government, the Federal Circuit merely held that "[t]he question whether a taking occurs depends on 'the cause of the insolvency.'" Opp. 18 (quoting Pet. App. 8a). But here, Petitioners alleged – and submitted evidence to demonstrate – that "the cause of the insolvency" was nothing other than the Government's breach of contract. Neither the Government nor the Federal Circuit even attempt to explain why that "cause" is "not sufficient" to constitute a taking. If the Government's direct abrogation of its own, bargained-for contract is not sufficient "cause," then what is?

As explained in the petition, this Court has held that Government assurances that are far less formal or bilateral than a contractual promise have given rise to expectations that provide a property owner with a right to Just Compensation under the Takings Clause. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The Government's only answer to those cases is to point out that "neither case involved a contract." Opp. 20. That, of course, is the whole point: if the assurances in those cases gave rise to a right to Just Compensation, surely a contractual promise does as well.

It is also no answer to these authorities for the Government to argue that "the right of a non-breaching party

to a contract with the government to seek contract damages for the government's breach of contract forecloses a claim that the government's breach constituted a taking." Opp. 19. Here, the non-breaching party's contract remedy was *itself* foreclosed due to the Federal Circuit's conclusion that Security was not entitled to recover any damages "even if" it could prove that it would not have been seized and would have been worth at least $44 million but for the breach. Of course, if the arguments advanced above are correct, that conclusion should be reversed as a matter of ordinary contract law. However, to the extent there is some strange feature of either Article III or federal receivership law that somehow demands the Federal Circuit's rejection of Petitioners' contract claim, the Takings Clause must be implicated. It is simply not tenable that the owner of a thrift worth at least $44 million is entitled to *nothing* despite the fact that but for the Government's breach of its regulatory capital contract, the thrift would still be in business today.

CONCLUSION

For the forgoing reasons, the petition should be granted.

May 10, 2004

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IN THE

Supreme Court of the United States

H.C. BAILEY, JR., ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR AMBASE CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION ADDRESSED BY AMICUS

Under this Court's precedents, the physical seizure of a viable business by the government constitutes a *per se* taking requiring just compensation under the Fifth Amendment. The government physically seized viable businesses owned by petitioners and *amicus*. Has the Federal Circuit erred in categorically refusing to apply the *per se* takings analysis where the business seized is a savings and loan institution?

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, AmBase Corporation states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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BRIEF FOR AMBASE CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONERS

AmBase Corporation, as *amicus curiae*, respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTRODUCTION AND INTEREST OF AMICUS

The second question presented by petitioners in this case is whether the Federal Circuit erred in rejecting as a matter of law their claim that the government's seizure of a private business—a savings and loan institution—constituted a taking requiring just compensation under the Fifth Amendment. The government also seized a thrift owned by *amicus*, and the Court of Federal Claims denied its taking claim for reasons similar to those adopted in the decision below. *See AmBase Corp.* v. *United States*, 58 Fed. Cl. 32 (2003).

In 1988, AmBase Corporation purchased all of the outstanding stock of Carteret Bancorp, Inc., the holding company of Carteret Savings Bank, a federally chartered savings and loan association. Before the AmBase acquisition, Carteret had acquired four failing thrifts pursuant to *Winstar*-type contracts with the Federal Savings & Loan Insurance Corporation (FSLIC). *See* 58 Fed. Cl. at 34-37; *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

"Throughout the mid-1980's, Carteret was a healthy and profitable business." 58 Fed. Cl. at 37. It recorded positive net income every year, increased its assets from less than $2 billion to almost $6 billion, and increased its regulatory net worth from $71 million to $321 million. *Ibid.* A significant portion of that net worth was $182 million in supervisory goodwill remaining from Carteret's acquisition of failing thrifts earlier in the decade. *Ibid.* In 1988, AmBase agreed to purchase Carteret for $266 million. *Ibid.*

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) revised many of the rules applicable to thrift institutions, including the calculation of regulatory capital. *See Winstar*, 518 U.S. at 857 (plurality opinion). FIRREA required, among other things, that supervisory goodwill be phased out in no more than five years notwithstanding any preexisting contractual amortization periods. "Given the amount of supervisory goodwill on Carteret's books, Carteret was particularly concerned about FIRREA's provisions that phased out the amount of supervisory goodwill that could be used towards meeting capital requirements." *AmBase*, 58 Fed. Cl. at 38.

In late 1989, AmBase infused $20 million into Carteret; on February 13, 1991, AmBase infused another $30 million into Carteret. 58 Fed. Cl. at 38. "[B]y June of 1991, Carteret had not secured [additional] new capital, and despite the inclusion of supervisory goodwill in regulatory capital, reported to the OTS that it had failed to meet all three minimum capital requirements [under FIRREA]." *Id.* at 39. But "[d]espite Carteret's difficulty in securing new capital, by the end of November of 1992, Carteret had returned to profitability, recording positive net income of $11 million." *Ibid.* Because of the "death spiral" induced by FIRREA, however, the thrift failed to meet the new capital requirements, "and on December 4, 1992, the OTS placed Carteret into conservatorship with the Resolution Trust Corporation [(RTC)]." *Ibid.*

AmBase sued the government for, among other things, taking its property (Carteret) without paying just compensation. The government responded "that the imposition of a conservatorship on a failed thrift is not, and cannot, be a taking." 58 Fed. Cl. at 50. The Court of Federal Claims agreed, stating that "it is well established that the government's seizure and closure of an insolvent bank and the appointment of a receiver to control the bank's assets pursuant to valid federal statutes is not a taking under the Fifth Amendment." *Ibid.* The court further observed that the thrift retained a cause of action for breach of contract, and concluded that, at least in cases involving contractual rights, "the takings claim can only exist if there is no remedy other than a takings claim for the government's breach of contract." *Id.* at 51.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's decision in this case is the culmination of a series of cases in which that court (and, following its lead, the Court of Federal Claims) has effectively declared the constitutional guarantee of just compensation in the event of a governmental taking inapplicable to an entire sector of the American economy—the regulated financial services industry. The Constitution, however, contains no exception for banks and thrifts, and the Federal Circuit's creation and enforcement of just such an exception cannot be reconciled with this Court's Takings Clause jurisprudence. Review is warranted to ensure that owners of financial institutions are afforded the same Fifth Amendment protection as owners of other types of businesses.

1. The government's physical occupation of private property constitutes a *per se* taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Government-chartered businesses are treated the same as other private property for Takings Clause purposes. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 341 (1893) (the government "can no more take the franchise which the

state has given than it can any private property belonging to an individual"). Thrifts are government-chartered businesses. *Winstar*, 518 U.S. at 844. It should necessarily follow that the government's physical occupation of a thrift business constitutes a *per se* taking. But in the Federal Circuit it does not. That conclusion warrants review by this Court.

a. At least since *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), this Court has drawn a distinction between "regulatory" and "*per se*" takings, reserving the latter category for cases in which the government physically occupies private property. In *Loretto*, for example, the Court held that a law mandating the installation of cable television equipment on private buildings constituted a permanent physical invasion of private property, and thus constituted a *per se* taking requiring just compensation without need to resort to the *ad hoc* factors articulated in *Mahon* and subsequent regulatory taking cases. *See* 458 U.S. at 434-35.

The *Loretto* Court explained that the *per se* rule is warranted for four principal reasons. First, it is dictated by precedent: This Court has always considered physical occupations to be takings. 458 U.S. at 427-35 (citing, *inter alia*, *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166, 181 (1871); *Transportation Co.* v. *Chicago*, 99 U.S. 635, 642 (1879)). Second, this "traditional rule . . . avoids otherwise difficult line-drawing problems," because "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Id.* at 436-37. Third, "the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441. And fourth, property owners entertain "a historically rooted expectation of compensation" when the government physically occupies their property. *Ibid.*

This Court has consistently treated the government's seizure of a business as a *per se* taking. *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co.* v.

United States, 338 U.S. 1 (1949); *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280 (1926). In fact, the Court has often cited business seizure cases to *distinguish* such *per se* takings from mere regulatory takings: In *Loretto*, for example, the Court cited *Pewee Coal* as an example of the traditional rule. 458 U.S. at 431-32; *see also Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 & n.18 (2002); *First English Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304, 331-32 (1987) (Stevens, J., dissenting).

The government physically seized the thrifts formerly owned by petitioners and *amicus*. *See Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1073 (Fed. Cir. 1994) ("when the Comptroller placed the Bank in FDIC receivership there was, in a very real sense, a physical invasion and permanent occupation"). When they were seized, the thrifts were worth millions of dollars.[2] This Court's precedents indicate that these seizures—like the seizure of any business—should be analyzed under the *per se* takings doctrine.

b. The Federal Circuit, however, has concluded that the government's seizure of a particular *type* of business—federally regulated banks and thrifts—can never constitute a *per se* taking. *Bailey* v. *United States*, 341 F.3d 1342, 1347 (Fed. Cir. 2003). The rule applied in the decision below is the result of a series of cases involving compounding errors.

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[2] Today, the thrifts are worth nothing—"not because [the] property vanished into thin air" (*Armstrong* v. *United States*, 364 U.S. 40, 48 (1960)), but because of losses attributable to the government liquidation. *See Pewee Coal*, 341 U.S. at 117-19 (government responsible for post-seizure losses). For this reason, the notion of a "receivership deficit" is irrelevant to a claim for just compensation under the Fifth Amendment. The government is responsible for the value of the property to its owners on the date it was seized, regardless of any subsequent decline in value.

The genesis of the Federal Circuit's flawed approach lies in *American Continental Corp.* v. *United States*, 22 Cl. Ct. 692 (1991), which involved a thrift that was placed into conservatorship after a regulatory finding that it was in an "unsafe and unsound" condition. The thrift challenged the appointment of a conservator, but a district court sustained the regulatory finding. The thrift then brought a separate action under the Takings Clause, which was rejected by the Claims Court. That court held that *Loretto*'s *per se* rule did not apply to thrifts because thrift owners' "expectations as to the operation of [their property] reasonably must have been rooted in the scope of the government's regulatory authority rather than in historical notions of the rights of owners of physical things." *Id.* at 700.

The Federal Circuit adopted the *American Continental* approach in *California Housing Securities, Inc.* v. *United States*, 959 F.2d 955 (Fed. Cir. 1992), which also involved a thrift placed into conservatorship following a regulatory finding that it was unsafe and unsound. The court said that "*Loretto* simply does not fit cases such as this where the historically rooted expectations of ownership that underlie *Loretto* do not exist." *Id.* at 959-60. Those expectations do not exist in the thrift industry, according to the Federal Circuit, because thrift owners "lack[] the fundamental right to exclude the government from [their] property at those times when the government could legally impose a conservatorship or receivership on [the thrift]." *Id.* at 958.

Both *American Continental* and *California Housing* involved thrifts that failed to meet *preexisting* regulatory requirements.[3] The Federal Circuit has subsequently extended

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[3] It is therefore possible that the *holdings* of these early cases were correct: If the government adequately established that the thrifts were seized for failure to comply with rules inherent in their charters, then no just compensation would have been due. But the *reasoning* employed by the Federal Circuit in *California Hous-*

its no-takings rule to cases in which the government seizure was based on a *change* in regulation. *See Golden Pacific*, 15 F.3d at 1072-74 (no *per se* taking despite claim that regulators "reneged" on a prior commitment regarding solvency determinations). In *Branch* v. *United States*, 69 F.3d 1571 (Fed. Cir. 1996), which was the first case in which a takings claim was expressly premised on the changes wrought by FIRREA, the court said only that "[i]t is well established that it is not a taking for the government to close an insolvent bank and appoint a receiver to take control of the bank's assets." *Id.* at 1575; *see also Castle* v. *United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002) ("seizure of a bank for failure to meet regulatory capital requirements does not constitute a taking"), *cert. denied*, 123 S. Ct. 2572 (2003).

The decision below, in which the Federal Circuit said only that "[w]e have already rejected the theory that regulatory assessments of liability fall into the category of per se takings" (*Bailey*, 341 F.3d at 1347), thus follows a line of precedent to the same effect. The validity of that line warrants examination by this Court.

2. The Federal Circuit's conclusion that the *Loretto* rule is inapplicable to the banking industry, although variously articulated in the decisions summarized above, ultimately rests on four interrelated grounds: (a) the owners of thrifts and banks do "not possess the most valued property right in the bundle of property rights, the right to exclusive possession, or stated conversely the right to exclude others" (*California Housing*, 959 F.2d at 958); (b) thrift owners have no "historically rooted expectation of compensation" (*ibid.*); (c) banking is a highly regulated industry (*id.* at 959); and (d) thrift owners give up their right to just compensation in ex-

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ing was manifestly incorrect, and has been subsequently adopted as a legal rule supporting the *judgments* in cases arising under very different circumstances, including the decision below.

change for governmental benefits (*ibid.*). Each is squarely contrary to this Court's precedents.

a. With respect to the first point, the Federal Circuit has asserted that bank and thrift owners "lack[] the fundamental right to exclude the government from [their] property *at those times when the government could legally impose a conservatorship or receivership.*" *California Housing*, 959 F.2d at 958 (emphasis added); *see also Golden Pacific*, 15 F.3d at 1074.

The Federal Circuit's reformulation of the *per se* analysis begs the constitutional question. To say that the taking is *authorized* by law says nothing about whether just compensation is due. The cable operators in *Loretto*, after all, were *authorized* to place their equipment on building rooftops; the question was whether the property owners were constitutionally entitled to just compensation based on the exercise of that authority. *See Loretto*, 458 U.S. at 426 ("a permanent physical occupation *authorized by government* is a taking without regard to the public interests that it may serve") (emphasis added). The Court's affirmative answer to that question points up the fallacy in the Federal Circuit's reasoning. Under the Federal Circuit's approach, the government could always avoid the obligation to pay just compensation simply by securing advance authorization for its seizures. But that is not, nor has it ever been, the law. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 632 (1952) (Douglas, J., concurring).[4]

It is a truism that the government, without paying just compensation, "may condemn unsafe structures, may close

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[4] Indeed, authorization is a prerequisite to a takings claim: If a governmental seizure is not authorized by law, the property owner has a claim in tort against the government official, not a constitutional claim against the sovereign. *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 333-34 (1920).

unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas." *First English*, 482 U.S. at 325-26 n.4 (Stevens, J., dissenting); *see, e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491-92 (1987). The Federal Circuit has adopted this premise, with which no one disagrees, as its conclusion: *Every* bank and thrift seizure, the Federal Circuit has decided, falls within the government's authority to regulate business. But "like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment." *Monongahela Navigation*, 148 U.S. at 336.

The very basis of cases such as these is that the thrifts were *not* "unlawful business operations" at the time of seizure. A central premise of the lawsuits brought by petitioners and *amicus* is that their thrifts would have complied with applicable law were it not for changes wrought by FIRREA—changes from which the thrifts had attempted to insulate themselves by contracts that the government breached. While banking is obviously a regulated industry, and participants in the industry accept regulation as part of the background principles pursuant to which thrifts must operate, the government "does not have unlimited power to redefine" those background principles. *Loretto*, 458 U.S. at 439; *see also Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992). Otherwise, the thrifts' "right to exclude would not be regulated, it would be eviscerated." *Dolan* v. *City of Tigard*, 512 U.S. 374, 394 (1994).[5]

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[5] Like the seizure of a thrift, the condemnation of a private residence is a *per se* taking of the owner's physical property. In certain circumstances (*e.g.*, where the government proves that the residence was purchased with the proceeds of illegal activity), the government may not be required to pay just compensation to the owner. But unless the government is able to carry its burden of

This Court has made it abundantly clear that if the government attempts to avoid paying just compensation on the ground that a taking is justified by some background principle that inheres in the title to the property, it bears the burden of proving the validity of such a defense. *Lucas*, 505 U.S. at 1031-32. That is because a "State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). But the Federal Circuit has allowed the federal government to get away with just such an *ipse dixit* by converting a defense—the purported insolvency of the thrift—into a categorical bar on the availability of the takings remedy. This Court has repeatedly emphasized that this approach is inconsistent with the Takings Clause. *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001).

b. The Federal Circuit, reasoning that "*Loretto* simply does not fit cases . . . where the historically rooted expectations of ownership that underlie *Loretto* do not exist," has held as a matter of law that thrift owners lack a constitutionally protectable expectation of just compensation for the seizure of their property. *California Housing*, 959 F.2d at 959-60; *see also Golden Pacific*, 15 F.3d at 1074. This special rule for the thrift industry conflicts with settled takings law.

In *Preseault* v. *United States*, 100 F.3d 1525, 1539-40 (Fed. Cir. 1996), the en banc Federal Circuit expressly rejected, in a case involving a taking of land, the notion that a *per se* taking under *Loretto* may be found only after it is determined that the property owner had a "historically rooted expectation of compensation." Such a reading of *Loretto*, the

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proving that the owner has forfeited his ownership rights by violating some established rule that inheres in the title to the property, the Constitution requires the government to pay for the fair value of the property taken. There is no basis in this Court's takings jurisprudence for applying any different rule to thrift seizures.

Federal Circuit explained, "stand[s] the law on its head." *Id.* at 1540. Nevertheless, the Federal Circuit has continued, even after *Preseault*, to mechanically apply the holding of *California Housing* and its progeny to cases involving bank and thrift seizures. *See, e.g., Bailey*, 341 F.3d at 1347; *Castle*, 301 F.3d at 1341. It has thus refused to rely on *Loretto* solely in the context of the financial services industry, for a reason that the en banc court has expressly rejected for all other property owners. Review by this Court is warranted to both reaffirm the holding of *Loretto* and to ensure that the Federal Circuit affords owners of financial institutions the same constitutional protections it affords to owners of other types of property.

c. The Federal Circuit has also accepted the bare existence of federal regulation as justification for wholesale seizures of financial institutions. *See California Housing*, 959 F.2d at 959 ("Given [the] long history of government regulation of savings and loan associations, [plaintiffs] were certainly on notice that [the thrift] might be subjected to different regulatory burdens over time"). But in our modern society, some entity of state or federal government regulates virtually all businesses—not only banks, but law firms, autobody shops, accountants, hairdressers, and so forth. The Federal Circuit's rule improperly "conflates the scope of [the government's regulatory] power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution." *Preseault v. ICC*, 494 U.S. 1, 23 (1990) (O'Connor, J., concurring). Whether applied across the board or only to banks, the Federal Circuit's rule conflicts with this Court's precedents.[6]

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[6] This Court has held, for example, that even "pervasively regulated businesses" are entitled to the protections of the Fourth Amendment. *New York* v. *Burger*, 482 U.S. 691 (1987). There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the . . . Fourth Amendment,

It is well-established that "[t]he scope of the [government's] authority to regulate ... is an issue quite distinct from whether [its] exercise of [that authority] effected a taking." *Preseault*, 494 U.S. at 22 (O'Connor, J., concurring); *see, e.g.*, *Sinking-Fund Cases*, 99 U.S. 700, 719-20 (1878) (recognizing that a railroad's property could be taken within the meaning of the Fifth Amendment although the railroad was "a creature of the United States," "created for public purposes," "to a large extent devoted to public uses" and "subject to legislative control"); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-73 (1979) (explaining that "while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers and Harbors Appropriation Act," it does not follow that no taking has occurred). The Federal Circuit, by confusing the two issues, has erroneously deprived thrift owners of a remedy guaranteed to them by the Constitution.

d. The Federal Circuit's final ground for rejecting *Loretto* was that "[i]n exchange for the benefit of federal deposit insurance, [the thrift] gave the government the right, among other rights, to place [it] in conservatorship or receivership when warranted." *California Housing*, 959 F.2d at 959.

Under some circumstances, the government may expressly condition the grant of benefits on a surrender of property rights. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984). But merely by acquiring regulated property, thrift owners do not consent to its seizure. *See, e.g.*, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 833 (1987) ("the announcement that the application for (or granting of) [a building] permit will entail the yielding of a property interest cannot be regarded as establishing the type of voluntary 'ex-

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should be relegated to the status of a poor relation in these comparable circumstances." *Dolan*, 512 U.S. at 392.

change'" that would allow an uncompensated taking); *Loretto*, 458 U.S. at 439 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"). Even if the benefits of regulation were relevant, the government would have to carry its burden of proving in each particular case that no just compensation is due because the value of the benefit conferred outweighs the cost of seizure.[7]

3. The reasoning of the *California Housing* line of cases has led to its own *per se* rule in the Federal Circuit: The seizure of thrifts can *never* be a taking and is not even to be analyzed under the *Loretto* framework. *See, e.g.*, *Bailey*, 341 F.3d at 1346-47; *Castle*, 301 F.3d at 1341; *Branch*, 69 F.3d at 1575; *Golden Pacific*, 15 F.3d at 1073-74; *AmBase*, 58 Fed. Cl. at 50. That conclusion warrants review by this Court.

A thrift seizure is a prototypical physical occupation. On the appointed day, federal agents typically storm the building just before opening or just after closing, and order all employees to leave. They then secure the files, vault, and computer systems, and lock the doors to prevent anyone from entering. The physical property and its operations are then turned over to a government entity (as conservator or re-

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[7] In this regard, the court also would have to weigh the benefits conferred by private owners on the government. In the 1980s, thrift acquirers saved the government billions of dollars by averting thrift closures. With respect to Carteret, for example, FSLIC saved $180 million when Carteret acquired four failing thrifts, thus averting their closure. The government's only "payment" for that benefit was the promises that it subsequently repudiated. Through these lawsuits, petitioners, *amicus*, and others are seeking nothing other than compensation for benefits previously conferred, and advantages previously promised, by the government. The government, by contrast, seeks to avoid any financial responsibility notwithstanding its breach of trust.

ceiver) for liquidation, or sale. In a single day, the owners' property interests—worth millions of dollars before the government's arrival—are eradicated. If the government's occupation of a laundry or coal mine constitutes a physical taking (and this Court has held that they do), it is difficult to conceive of a thrift seizure as anything other than a *per se* taking.

4. Even if the Federal Circuit were correct that the *Loretto* rule does not apply in the context of thrift seizures, that would not end the inquiry. Thrift owners, like petitioners and *amicus*, whose property was seized solely on the basis of a change in the regulatory regime, should be afforded the opportunity to prove a regulatory taking under the three-part approach articulated in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). But as explained in the petition (at 20-30), the Federal Circuit has also erred in its analysis of thrift seizures under the regulatory taking doctrine, effectively adopting yet another *per se* rule that FIRREA effected no regulatory takings regardless of the circumstances of particular cases. *See Bailey*, 341 F.3d at 1347 ("the seizure of thrifts 'for failure to comply with the regulatory requirements imposed by FIRREA' does not constitute a regulatory taking") (quoting *Castle*, 301 F.3d at 1341).

The Federal Circuit's approach to regulatory taking cases simply ignores the fact that FIRREA worked a wholesale evisceration of contracts expressly designed to protect thrifts and their owners from precisely the type of regulatory change that Congress wrought in 1989. As a result, the line of Federal Circuit cases is irreconcilable with this Court's explicit recognition that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); *see also De Laval Steam Turbine Co.* v. *United States*, 284 U.S. 61, 71 (1931) (cancellation of a government contract "is an exercise of the power of eminent domain, and

the liability of the government is for just compensation").[8] The Federal Circuit's approach also cannot be reconciled with this Court's recognition that governmental promises can result in reasonable, investment-backed expectations, the frustration of which gives rise to a takings claim. *Monsanto*, 467 U.S. at 1011; *Kaiser Aetna*, 444 U.S. at 179-80. And the Federal Circuit, by refusing to hold the government liable for just compensation notwithstanding the total elimination of thrift owners' property rights, has failed to heed the "categorical rule that total regulatory takings must be compensated." *Lucas*, 505 U.S. at 1026. Its regulatory taking analysis in thrift cases is thus as unmoored from this Court's precedents as is its refusal to apply *Loretto* in this context.

The Federal Circuit, in short, has left petitioners, *amicus*, and owners of other seized thrifts with no recourse under the Fifth Amendment. This conclusion, as exemplified by the decision below, violates numerous core precepts of this Court's takings jurisprudence. The Federal Circuit has so far departed from the accepted course of constitutional adjudication that this Court's review is warranted. Otherwise, prop-

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[8] The Court of Federal Claims suggested that the Takings Clause has no application where there also exists a contract between the claimant (or a related entity) and the government. 58 Fed. Cl. at 51. To the extent the government reiterates that argument here, it is wrong for the reasons stated in the Brief for John K. Castle et al. as Amici Curiae Supporting Petitioners, *Franconia Assocs.* v. *United States*, No. 01-455 (Feb. 2002), at 6-23. Even where a contractual remedy exists, the Takings Clause remedy remains available to "cove[r] any shortfall between [the alternative] remedy and just compensation." *Monsanto*, 467 U.S. at 1018; *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156 (1974); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-95 (1985). Where a contractual remedy is unavailable—for whatever reason—the government's constitutional obligation to pay just compensation is undiminished.

erty owners will continue to be denied the remedy that the Constitution expressly confers upon them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

H.C. BAILEY, JR., ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR FRANKLIN SAVINGS CORPORATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION ADDRESSED BY *AMICUS*

Under this Court's precedents, the government's seizure of a viable business, and the subsequent destruction of the economic value of that business, constitutes a taking requiring just compensation under the Fifth Amendment. The government seized and rendered valueless profitable businesses owned by petitioners and by *amicus*. Did the lower court err in following Federal Circuit precedent holding that the government need not pay just compensation where the business seized and destroyed is a savings and loan institution?

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BRIEF FOR FRANKLIN SAVINGS CORPORATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Amicus curiae respectfully submits that the petition for a writ of certiorari should be granted.[1]

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that no party had any role in writing this brief and that no one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed with consent of all parties; their letters of consent have been filed with the Clerk.

INTEREST OF *AMICUS*

The second question presented by petitioners in this case is whether the Federal Circuit erred in rejecting as a matter of law their claim that the government's seizure and destruction of a private business—a savings and loan institution worth at least $44 million—constituted a taking requiring just compensation under the Fifth Amendment. The government also seized and destroyed a thrift owned by *amicus*. The Court of Federal Claims, claiming to follow Federal Circuit precedent, denied the takings claim of *amicus* for reasons similar to those adopted in the decision below. The case brought by *amicus*, now on appeal to the Federal Circuit, involves no "goodwill" contract with the government, and thus is not a "*Winstar*-related" case.

The takings claims asserted by *amicus* (hereafter "Franklin Corp."), arise from the seizure and destruction of Franklin Savings Association under the following circumstances: Franklin Corp. owned almost all the stock of Franklin Savings, a thrift that prospered in the 1980s. From 1984 through 1988, Franklin Savings received very favorable examination ratings from federal regulators. By 1989-90, the thrift had GAAP capital exceeding $370 million, well above regulatory requirements, and a going-concern value of between $250 and $700 million. *Franklin Sav. Ass'n v. OTS*, 742 F. Supp. 1089, 1122-23 (D. Kan. 1990), *rev'd on other grounds*, 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992).

After FIRREA, government regulators suddenly raised questions about Franklin's accounting practices—all of which have been proven to be unfounded (even as of the time when raised). Although Franklin had demonstrated to government regulators at the time that Franklin's accounting was proper under GAAP and applicable regulations, *see id.* at 1112, in February 1990 the OTS Director appointed the Resolution

Trust Corporation as "conservator" for Franklin Savings, specifically "not for the purposes of liquidation." 934 F.2d at 1135.

Both Franklins brought an action to remove the conservator under 12 U.S.C. § 1464(d)(2)(E) (2003). Following an extensive trial, the district court concluded that the administrative record upon which the OTS Director had based the appointment "contained fundamental factual errors as well as material errors of interpretation and analysis," 742 F. Supp. at 1106. Instead, the trial evidence established (1) that "OTS lacked any factual basis [for] its appointment of a conservator under the three statutory grounds [it] relied [upon]." *id.* at 1126; (2) there was "clear proof that Franklin [Savings] was not insolvent or in a weakened condition at the time the conservator was imposed," *id.* at 1124; (3) the thrift "had GAAP capital of $387 million on December 31, 1989," *id.* at 1122; and (4) "the going concern value of Franklin [was] . . . $250-700 million," *id.* at 1123. The court also found that capital write-downs that OTS directed *after* the conservator's appointment, which were financially devastating to Franklin Savings, also "[were] arbitrary and capricious and lacked any reasonable basis." *Id.* at 1108-10. The court ordered the government's conservator removed. *Id.* at 1128. The Tenth Circuit reversed on appeal, holding that FIRREA prescribed very limited judicial review of thrift-conservator appointment decisions. 934 F.2d at 1140. The Tenth Circuit later justified this result by pointing to the availability of after-the-fact monetary relief under, *inter alia*, the Just Compensation Clause of the Fifth Amendment. *Franklin Sav. Ass'n v. OTS,* 35 F.3d 1466, 1472 (10th Cir. 1994).

RTC served as Franklin Savings' conservator for more than two years, during which the government ceased making new loans and otherwise discontinued the thrift's business, and dissipated its assets. OTS eventually replaced the conservator with a receiver (also RTC), which then sold the thrift's remaining property. The FDIC (RTC's successor as receiver)

remains in possession of Franklin Savings to this day. But Franklin Corp., which was forced into bankruptcy, has never received any receivership distribution. Thus, although Franklin Corp. owned a thrift whose business was worth at least $250 million the day before the government appointed its "conservator" for Franklin Savings, today that business is worthless, and Franklin Corp. has received nothing from the thrift's receivership.

Franklin Corp. and Franklin Savings instituted various claims in the former's bankruptcy case seeking after-the-fact monetary relief as the Tenth Circuit had directed. *See also Franklin Sav. Ass'n*, 934 F.2d at 1141 ("a conservator ordinarily acts as a guardian or a protector"). After their takings claims were transferred to the Court of Federal Claims, however, that court dismissed the claims on the basis of the same Federal Circuit precedent that led to dismissal of Bailey's takings claim in this case. *Franklin Sav. Corp. v. United States*, 46 Fed. Cl. 533, 535-36 (2000) ("On three occasions, the Federal Circuit has explicitly held that such seizure of a financial institution does not constitute a Fifth Amendment taking.") (citations omitted). That dismissal ruling is on appeal to the Federal Circuit.

SUMMARY OF ARGUMENT

In this case and that of *amicus,* the government physically intruded upon (or "seized") the claimant's business property and also destroyed the economic value of that property. Although the resulting takings claims should therefore be deemed "categorical" takings under both *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Federal Circuit denied the takings claim in this case (and the Court of Federal Claims denied the takings claim of *amicus*) by applying a series of prior Federal Circuit decisions that have largely declared the constitutional guaran-

tee of just compensation in the event of a governmental taking inapplicable to an entire sector of the American economy—the regulated financial services industry. *See Bailey v. United States*, 341 F.3d 1342, 1346-47 (Fed. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3506 (U.S. Jan. 26, 2004) (No. 03-1073); *Castle v. United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 2572 (2003); *Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995); *Golden Pac. Bancorp. v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir.), *cert. denied*, 513 U.S. 961 (1994); *California Housing Secs., Inc. v. United States*, 959 F.2d 955, 957-58 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992). The petition for writ of certiorari should be granted to ensure that the Federal Circuit applies this Court's Takings Clause jurisprudence in a manner that affords the owners of financial institutions the same constitutional protections as owners of other types of businesses.

ARGUMENT

It matters not whether the issue is considered under *Loretto* or *Lucas*, for either decision on its own—and surely their combined thrust—shows that the government has taken the property of the thrift owners without paying just compensation.

A. In this case and that of *amicus*, the lower courts have disregarded a long line of this Court's precedent culminating in *Loretto*, where the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. at 426. Indeed, as *Loretto* recounts, *see id.* at 427-35, this Court has consistently treated the government's seizure of a business as a *per se* taking. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926). In fact, the Court has often cited busi-

ness seizure cases to *distinguish* such *per se* takings from mere regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 & n.18 (2002); *Loretto*, 458 U.S. at 431-32; *see also First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 331-32 (1987) (Stevens, J., dissenting).

In explicitly declining to apply the rule of *Loretto*, *see California Housing Securities,* 959 F.2d at 957-58, the Federal Circuit accepted the bare existence of federal regulation as justification for wholesale seizures of financial institutions. *See id.* at 959 ("Given [the] long history of government regulation of savings and loan associations, [plaintiffs] were certainly on notice that [the thrift] might be subjected to different regulatory burdens over time."). In particular, the Federal Circuit concluded that as a "consequence" of the regulated environment in which thrifts operate, thrifts and their owners "h[o]ld less than the full bundle of property rights on which a *Loretto* expectation of compensation is founded." *Id.* at 958. This conclusion violates both the rule and the underlying rationale of *Loretto*. As this Court there explained, "when the 'character of the governmental action,' *Penn Central* [*Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)], is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic import on the owner." *Loretto*, 458 U.S. at 434-35.

B. Even apart from *Loretto*, and this Court's business seizure takings cases on which it is built, *see Loretto,* 458 U.S. at 427-35, the decision below and the Federal Circuit precedent that led to dismissal of *amicus*' takings claims are contrary to this Court's Takings Clause jurisprudence for a separate reason: they also disregard *Lucas.* In addition to physically seizing the thrifts previously owned by Bailey and *amicus*, the government through its regulatory actions has

completely destroyed the economic value of these thrifts. By doing so the government went "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Although regulatory takings claims frequently involve a contextual weighing of a number of factors, this Court emphasized in *Lucas* that the Constitution imposes a "categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. *See also United States v. General Motors Corp.*, 323 U.S. 357, 378 (1945) ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.") (footnote citing cases omitted).

The Federal Circuit has sought to avoid this established "total regulatory takings" doctrine in bank seizure/takings cases like this one on essentially the same ground that the court sought to avoid *Loretto*, namely, by pointing to the existence of extensive regulation in the banking and thrift industries—"[g]iven the highly regulated nature of the banking industry, just as under a *Loretto* analysis [the bank] could not have had a historically rooted expectation of compensation for the Comptroller's actions, so too, the Comptroller's actions could not possibly have interfered with a reasonable investment-backed expectation on the part of [the bank]." *Golden Pac. Bancorp*, 15 F.3d at 1074. But the existence of prior regulation does not alone create an exception to the rule of *Lucas* either, *see* 505 U.S. at 1029-32, and therefore prior regulation alone should not be held to authorize the government to completely eliminate an owner's valuable interest in his property. Indeed, in *Palozollo v. Rhode Island*, 533 U.S. 606, 626 (2001), this Court specifically rejected the assertion that "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations."

C. To put the issue most pointedly, the Federal Circuit's rulings as applied in this case effectively nationalize the thrift and banking industries by holding that owners of financial institutions have a mere possessory license that can be revoked without just compensation (or due process). Although the court's rationale would seem to apply to any industry with a history of extensive federal (or state) regulation, these rulings are all the more troubling because they single out the financial institutions industry for this dubious, disproportionate treatment. *Compare Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) (change in law held to be a regulatory taking in the subsidized housing industry, despite existence of heavy regulation). In the bank-seizure context, these rulings seem to say that government action *never* can "'go[ ] too far [so as to] be recognized as a taking,'" *Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal*, 260 U.S. at 415), whether the government breaches a contract, physically seizes and occupies a banking institution, expropriates a thrift's value, or as "conservator" drives a bank or thrift into the ground. This Court's rulings show that that understanding is wrong.

1. No doubt the property interests protected by the Fifth Amendment must be assayed against the backdrop of applicable regulation, which can help shape what are reasonable expectations entitled to protection. However, that the thrift industry has a history of federal regulation (and, for that matter, deregulation) does not strip the owners of thrifts of all stability in their economic expectations safeguarded by the label "property." To the contrary, this Court has held that there remains an irreducible core of protected property interests possessed by financial institutions, even in the doubly regulated area of the rights in bankruptcy of financial institu-

tions as against their debtors. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).[2]

The Federal Circuit's approach to thrift- and bank-seizure takings claims—which rests on a degree-of-federal-regulation test rather than a just-compensation inquiry—imperils the ability of any substantially regulated industry to solicit investment and raise capital, because in the Federal Circuit's view the greater the regulation the less the Constitution protects the property. At the extreme, which is where the Federal Circuit apparently views the heavily-regulated financial institutions industry, the degree of regulation has thus far led the court to rule invariably that the seizure of a thrift or bank can never be a taking. That startling result has been rejected by this Court at least since the seminal regulatory-takings decision in *Pennsylvania Coal,* where Justice Holmes' opinion for the Court recognized that, if "the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].'" *See Lucas*, 505 U.S. at 1014 (quoting *Pennsylvania Coal*, 260 U.S. at 415). For the financial-institutions sector, the string of Federal Circuit decisions including *Bailey* have indeed brought us to the point where private property has largely disappeared. Given the Federal Circuit's nationwide jurisdiction, this lack of protection for the property interests of thrift and bank owners is currently the law of the land, and plainly warrants review here to bring the Federal Circuit back into line with this Court's rulings. *See Palozolla*, 533 U.S. at 628 ("A blanket

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[2] *Radford* is notable because it deals not only with banking, and its history of extensive regulation, *compare United States v. Philadelphia National Bank*, 374 U.S. 321, 372 (1963) ("banking is a highly regulated industry critical to the Nation's welfare"), but especially because it finds a taking in the teeth of an exercise of Congressional power expressly authorized under the "Bankruptcy Clause" of Article I of the Constitution.

rule that purchasers with notice have no compensation right . . . is too blunt an instrument to accord with the duty to compensate for what is taken.").

2. Neither petitioners nor *amicus* contend that just compensation is owed when the government seizes a thrift that has made itself insolvent. Though the Court's rationale frankly has not always been clear in this regard, in those circumstances the payment of *nothing* is what is "just" and appropriate compensation. Indeed, one reason to issue the writ is to permit this Court to confirm that the propriety of police-power seizures turns not on the source of the government's authority but instead on the justness of not providing compensation when particular property is seized, such as many insolvent thrifts or foodstuffs unfit for human consumption. *See Marion & Rye Valley Ry.*, 270 U.S. at 282 ("For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company. . . .").

But that is not petitioners' circumstance as owners of the seized thrift here. In this case, petitioners unquestionably had a property interest in the thrift's value as of the day before FIRREA was passed, when the thrift was worth $44 million. Thus, petitioners have been denied the value of their investment in their savings and loan, and the deprivation in this case far traverses "the dividing line . . . between everyday regulatory inconveniences and those so severe that they constitute takings." *First English Evangelical Lutheran Church*, 482 U.S. at 330; *see also Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) ("The 'investment-backed expectations' that the law will take into account do not include the assumed

validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.").[3]

Ultimately it is important to distinguish the propriety of the government's seizure of impaired property from those circumstances where the actions of the government itself are what cause the value to become impaired. In the former category are uncompensated takings of property or limitations of the use of property that is noxious. *E.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (law effectively preventing continued operation of quarry in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law barring operation of brick mill in residential area); *Mugler v. Kansas*, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages). In contrast are cases, like the present one and that of *amicus*, where the government's own actions have wiped out the value of the property and just compensation is owed. *See Armstrong v. United States*, 364 U.S. 40, 48 (1960) ("the Government for its own advantage destroyed the value of the liens"). By importing principles from the noxious-property cases to this case and others where the government's own actions impaired—and indeed destroyed—the value of thrift institutions, the Federal Circuit in this case has given the government carte blanche to avoid the requirements of the Just Compensation Clause. *See Branch*, 69 F.3d at 1575 (explicitly rejecting takings claim arising from bank seizure in the face of facts showing that "the government caused the bank's insolvency").

In this case, the Federal Circuit sought to skirt the takings issue by suggesting that the FDIC had a prior right to the full

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[3] The post-seizure conduct of federally appointed conservators and receivers is "governmental" action and "regulatory" in nature. *See, e.g., United States v. Gaubert*, 499 U.S. 315 (1991).

value of the just-compensation claim, because as part of the winding up and liquidation of the thrift the FDIC was subrogated to claims potentially in excess of the thrift's (then) net worth. But the FDIC's subrogation claim, which arises *after* the regulatory takeover, is not dispositive because "[t]he measure of just compensation has always been the loss to the owner, not the loss or gain to the Government." *Pewee Coal*, 341 U.S. at 121 (Reed, J., concurring). The interests of the thrift and its owner are what are at issue, and it is beyond question that the government's actions here have led petitioners to lose their entire investment.

3. Three years ago, this Court recognized that it has "given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." *Palazzolo*, 533 U.S. at 617. The magnitude of the error below needs to be corrected. Review should also be granted to preclude erroneous results on similar facts where the government takes over and destroys thrifts and other federally regulated private institutions. This Court should grant the petition to set forth the proper approach for the courts to follow in determining when as here, the "government action goes too far and effects a regulatory taking."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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